CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 278

THE CUDAHY PACKING COMPANY, A CORPORATION, APPELLANT,

vs.

JAY GRANT HINKLE, SECRETARY OF STATE, AND JOHN H. DUNBAR, ATTORNEY GENERAL, OF THE STATE OF WASHINGTON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED JULY 16, 1928

(33,587)

(33,587)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 278

THE CUDAHY PACKING COMPANY, A CORPORATION, APPELLANT,

vs.

JAY GRANT HINKLE, SECRETARY OF STATE, AND JOHN H. DUNBAR, ATTORNEY GENERAL, OF THE STATE OF WASHINGTON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

INDEX

	Original	Print
Record from the district court of the United States, Western Washington	2	1
Bill of complaint	2	1
Summons and marshal's return (omitted in printing)	20	
Order setting cause for hearing and affidavit of service.	22	19
Motion to dismiss	26	21
Decrees	27	22
Opinion, Cushman, J.	31	24
Concurring opinion, Dietrich, J.	46	38
Dissenting opinion, Bourquin, J.	51	42
Assignments of error	53	44
Petition for appeal	56	46
Order allowing appeal	58	47
Order fixing bond (omitted in printing)	59	
Bond on appeal (" " ")	61	
Citation and service (" " ")	64	
Præcipe for transcript of record	66	48
Clerk's certificate (omitted in printing)	68	
Statement of points to be relied upon and designation to print entire record	69	49

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 22, 1928

[fols. a-2]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

No. 330-E

THE CUDAHY PACKING COMPANY, a Corporation, Plaintiff,

vs.

JAY GRANT HINKLE, Secretary of State, and JOHN H. DUNBAR, Attorney General of the State of Washington, Defendants

Complaint in Equity

BILL OF COMPLAINT—Filed Aug. 31, 1927

The plaintiff for a First Cause of Action in its petition and complaint alleges:

I

That The Cudahy Packing Company is a corporation organized and existing under and by virtue of the laws of the State of Maine, and no other state, and is domiciled and has its principal office and place of business in the City of Portland in said State of Maine, and is not now, nor has it ever been, a citizen of the State of Washington.

II

That the defendant, Jay Grant Hinkle, is a citizen of the State of Washington, an inhabitant of the Western District of Washington, a resident of the City of Olympia in the County of Thurston, and is the Secretary of State of the said State of Washington. That the defendant John H. Dunbar, is a citizen of the State of Washington, an inhabitant of the Western District of Washington, a resident of the City of Olympia in the County of Thurston, and is the Attorney General of the said State of Washington.

III

That this suit involves an unlawful regulation of interstate commerce, which deprives the plaintiff of property without due process of law and arises under a law regulating commerce known as the Interstate Commerce Act, and [fol. 3] that the value of plaintiff's right to do business in the State of Washington and the amount in controversy herein exceeds the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and cost.

IV

That this suit is brought for the purpose of restraining the defendants, in their respective official capacities, from enforcing against the plaintiff those laws of the State of Washington requiring foreign corporations doing business therein to secure a permit and pay the fees provided therefor, and to pay an annual franchise tax therefor, and providing penalties for failure to secure such permit and to pay such franchise tax, and providing for the enforcement of those penalties in part by the Secretary of State and in part by the Attorney General on the ground that those laws of the State of Washington conflict with the Constitution of the United States in that they take plaintiff's property without due process of law, regulate and burden its business of conducting interstate commerce, and deny to plaintiff the equal protection of the laws.

V

That the plaintiff is authorized by its charter: to purchase, deal in, and sell, cattle, hogs, sheep and other live stock, and animals used for food; to purchase for slaughter, and slaughter, prepare and pack, cattle, hogs, sheep and other live stock, and animals used for food, and to manufacture and dispose of the products thereof; to buy, sell, deal in, manufacture and dispose of, all articles and substances, necessary or incidental to, the manufacture or preparation of such products, or any by-products; to buy, sell, manufacture, and deal in, meats, provisions, and all classes of produce and packing house products; to buy, sell, prepare, preserve, manufacture and deal in, fruits, veg-

etables, foods and food stuffs of all kind whatsoever; to buy, sell, manufacture, and deal in, all articles of commerce made or prepared in whole or in part from the product of slaughter of, cattle, hogs, sheep or other live stock, or animals [fol. 4] used for food; to purchase, acquire, hold, own, lease, construct, maintain and use, all buildings, structures, machinery, apparatus, equipment, office, vehicles, cars, and agencies of every kind, nature and description, used or usable in the carrying out of any of the objects, purposes and businesses, aforesaid.

VI

That about forty years ago The Cudahy Packing Company, which was then largely engaged in the business of shipping its goods and merchandise from one state into another for sale and delivery and for delivery after sale, entered the State of Washington, selling its merchandise through traveling salesmen who took orders therefor and sent the orders to plaintiff's office at Chicago for acceptance and filling through shipment; and continuously since the plaintiff entered the State of Washington it has been engaged in interstate commerce between that state and other states of the Union, and has been actively engaged in interstate commerce between each and every one of the states of the American Union and in foreign commerce, shipping goods for sale, or after they have been sold, from the United States into Canada, Alaska and the Orient and other foreign countries.

VII

That at its principal office, as hereinbefore alleged, in the City of Portland, State of Maine, all of its corporate business, as distinguished from its mercantile and manufacturing business, is transacted; that the corporate meetings of the plaintiff are all held at the office at Portland; that its stock book is kept there, and all transfers of its capital stock are kept there, and the results of the plaintiff's business everywhere are assembled into accounts which are kept at Portland, which are the only books of account that disclose the results of all of plaintiff's business operations.

VIII

That besides its executive offices at Portland, the plain-[fol. 5] tiff, for the purpose of facilitating the transaction of its interstate business, as aforesaid, and its commerce with foreign nations, and in order that it may more conveniently serve those with whom it has transactions in such commerce, has established agencies in all of the states of the Union, and slaughter houses and packing houses in many of the said states of the Union, but it does not now, nor has it ever, maintained a slaughter house or packing house in the State of Washington, its only agency in the State of Washington being a warehouse and sales office which is located in the City of Seattle. That the only property of the plaintiff in the State of Washington consists of a lease on a warehouse and the refrigeration system and fixtures therein, the total value of which is about $40,000.00. That the plaintiff now employs in the State of Washington scores of salesmen who travel in and about the State of Washington soliciting orders for goods to be shipped directly from the plaintiff's packing plants in other states of the Union or from the warehouse at Seattle, none of whom take any orders for other goods save such as the plaintiff ships into the State of Washington direct to the purchaser or warehouses for the purpose of filling orders therefor.

That the stock of goods warehoused in the City of Seattle consists in the most part of original and unbroken packages of goods which the plaintiff has shipped into the State of Washington from its packing plants at Omaha, Nebraska; Kansas City, Missouri; Salt Lake City, Utah, and Los Angeles, California, which merchandise is in a large part reshipped and resold in original and unbroken packages in interstate and foreign commerce. That plaintiff's intrastate, interstate and foreign commerce are so inextricably interwoven that they cannot be separated.

IX

That plaintiff's gross sales for the year ending October 30th, 1926, amounted to $231,725,000.00, that of said sales $1,313,275.74 were made in the State of Washington, the other sales being goods sold and delivered in the other states and territories than the State of Washington with-

[fol. 6] out ever having come within the territorial boundaries of the State of Washington. That is to say, less than six-tenths of one per cent of the entire business of The Cudahy Packing Company for the year 1926 was done in the State of Washington. That more than one-half of all of the said sales made in the State of Washington were made in interstate and foreign commerce, and that more than one-half of all the merchandise handled by the plaintiff in its branch office in the State of Washington was resold in interstate commerce and in foreign commerce with Alaska, Canada, and practically all the countries of the Orient.

That the entire payroll of The Cudahy Packing Company for the year 1926 amounted to $15,952,066.78; that of said payroll $66,864.79 was earned in the State of Washington; that is to say, less than four-tenths of one per cent of the wages and salaries of plaintiff were earned in the State of Washington.

X

That The Cudahy Packing Company was duly and regularly incorporated in the State of Illinois and qualified for business in the State of Washington during the year 1890. That the said Cudahy Packing Company of the State of Illinois was succeeded by The Cudahy Packing Company, a Maine corporation, organized on the 7th day of October, 1915, and the said corporation qualified for business in the State of Washington on the 13th day of January, 1916, with a capital stock of $20,000,000.00. That the said Cudahy Packing Company duly and regularly filed supplemental articles with the Secretary of State of the State of Washington on the 20th day of May, 1919, authorizing an increase of capital stock to $35,000,000.00; since which date a further increase of the capital stock of The Cudahy Packing Company was authorized increasing the capital stock of said company to $45,000,000.00, but which supplemental articles have not been filed with the Secretary of State of the State of Washington.

XI

That at the time the plaintiff commenced doing business [fol. 7] in the State of Washington, and until the year 1897, no tax or fee was imposed upon either foreign or domestic

corporations, nor did either foreign or domestic corporations file certificates of increase or decrease of their capital stock in said state nor was there any requirement in the laws of said State that such certificates be filed therein.

By Chapter 70 of the Session Laws of 1897, which remained in effect until 1907, it was provided that any corporation having capital stock should pay the Secretary of State, for the use of the State, the sum of $10.00. By Chapter 140, Session Laws of 1907, which remained in effect until 1923, the same fee of $10.00 was imposed. By Chapter 144, Session Laws of 1923, the same fees for the filing of certificates of increase or decrease of capital stock were prescribed as those named in Sections 1 and 2, Chapter 149, Laws Extraordinary Session 1925, as hereinafter quoted, except that the proviso found in the act of 1925 limiting the total fee to $3,000.00, plus $10.00 for each separate instrument was omitted from the act of 1923. Until the year 1925 no law of the State of Washington required any corporation, either foreign or domestic, to file certificates of increase or decrease of their capital stock in any office of said State; the only requirement was that contained in Section 3853, Remington's Compiled Statutes of Washington, that every foreign corporation desiring to do business in the State of Washington should file a certified copy of its articles of incorporation, and the plaintiff, at the time of entering the State of Washington, fully complied with such requirement.

XII

In the year 1925, Section 1, Chapter 147, Session Laws of the State of Washington, Extraordinary Session 1925, was enacted amending Section 3853 of Remington's Compiled Statutes of Washington, and requiring each foreign corporation desiring to do business in the State of Washington to file in the office of the Secretary of State all certificates of increase or decrease of its capital stock.

Sections 1 and 2, Chapter 149, Laws of the State of Wash- [fol. 8] ington, Extraordinary Session 1925, provide:

"Section 1. That Section 3836 of Remington's Compiled Statutes, as amended by Section 1, Chapter 144, Session Laws of 1923, be amended to read as follows:

Section 3836. Every corporation incorporated under the laws of this state, or of any state or territory of the United States or of any foreign state or country, required by law to file articles of incorporation in the office of the secretary of state, shall pay to the secretary of state a filing fee in proportion to its authorized capital stock as follows:

Capital not exceeding $50,000.00, fee $25.00;

Capital of more than $50,000.00, and less than $100,000.00, fee $40.00;

Capital of $100,000.00, or more, and less than $150,000.00, fee $75.00;

Capital of $150,000.00, or more, and less than $200,000.00, fee $100.00;

Capital of $200,000.00, or more, and less than $300,000.00, fee $150.00;

Capital of $300,000.00, or more, and less than $400,000.00, fee $200.00;

Capital of $400,000.00, or more, and less than $500,000.00, fee $250.00;

Capital of $500,000.00, or more, and less than $1,000,000.00, fee $500.00;

Capital of $1,000,000.00, or more, and less than $2,000,000.00, fee $750.00; and $10.00 additional for each $1,000,000.00, or major fraction thereof, of capital stock in excess of $2,000,000.00: Provided, however, that the total filing fee for filing such articles of incorporation shall in no case exceed the sum of $3,000.00.

Section 2. That Section 3837 of Remington's Compiled Statutes, as amended by Section 2, Chapter 144, Session Laws of 1923, be amended to read as follows:

Section 3837. Every corporation, foreign or domestic, desiring to file in the office of the secretary of state articles amendatory or supplemental articles increasing its capital stock, or certificates of increase of capital stock, shall pay to the secretary of state the fees prescribed in the preceding section for the total amount to which the capital stock of the corporation is so increased, less the amount already paid for filing the original articles of incorporation, or original articles and amendatory or supplemental articles, or certificates of increase, and every such corporation desiring to file amendatory or supplemental articles decreasing, or certificate of decrease of capital stock, shall pay to the sec-

retary of state a filing fee of $25.00. For filing of other amendatory or supplemental articles, it shall pay a fee of $10.00: Provided, however, That the total amount paid by any corporation for filing its original articles of incorporation and all of its articles amendatory or supplemental articles increasing its capital stock or certificates of increase of capital stock, shall in the aggregate in no case exceed the sum of $3,000.00, plus $10.00 for each separate instrument filed in addition to its original articles of incorporation."

XIII

That prior to the 30th day of June, 1926, the plaintiff, [fol. 9] desiring to comply with Chapter 147, Laws of Extraordinary Session 1925, appeared before the Hon. Jay Grant Hinkle, Secretary of State, and the Hon. William G. Potts, Treasurer of the State of Washington, and tendered the Secretary of State, for filing in his office, a certificate of increase of capital stock bringing the capitalization of the plaintiff up to $45,000,000.00, and at the same time tendered the Secretary of State and the State Treasurer the sum of $10.00 as a fee for the filing of said certificate, but the said plaintiff was notified by the said Secretary of State that the said certificate would not be accepted for filing unless and until plaintiff should pay the sum of $580.00, less the sum of $25.00 paid at the time of filing the original charter, and less the sum of $10.00 paid for filing one certificate of increase, or a total net fee of $5.00, computed according to said Chapter 149, Laws Extraordinary Session 1925.

XIV

That of plaintiff's authorized capital stock of $45,000,000.00 but $29,800,000.00 have been issued, and that all of its property wherever situated does not exceed in value the amount of its capital stock issued, surplus and undivided profits. That plaintiff pays State, County and City taxes to the respective municipalities, counties and states wherein it has property.

XV

By Section 3855 of Remington's Compiled Statutes of Washington it is provided that any foreign corporation doing business in the State of Washington which shall fail to comply with the provisions of Sections 3853 and 3854 of Remington's Compiled Statutes, as amended by Chapter 147, Laws of Extraordinary Session 1925, "shall be subject to a penalty of $250.00 to be recovered in a civil action to be instituted by the attorney general"; and by Section 3861 of Remington's Compiled Statutes of Washington it is provided that any agent of any foreign corporation conducting or carrying on business within the limits of this State, for and in the name of such corporation, contrary to the provisions of Chapter 189, Laws of [fol. 10] 1881, as amended by said Chapter 147, Laws Extraordinary Session 1925, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for a term not exceeding three months, or by both such fine and imprisonment.

XVI

When the plaintiff appeared, as aforesaid, before the Secretary of State and Treasurer for the purpose of filing its certificate of increase of capital stock it was informed by said officers that unless the plaintiff paid the fee of $545.00 demanded by them for the filing of said certificate the Secretary of State would refuse to accept said certificate for filing and the said officers would request the Attorney General of the State of Washington to institute a civil action against the plaintiff for the penalty prescribed by Section 3855 of Remington's Compiled Statutes, and to institute prosecutions against the agents of the plaintiff conducting or carrying on its business in the State of Washington under Section 3861 of Remington's Compiled Statutes.

XVII

That in addition to the scores of traveling salesmen, hereinbefore referred to, plaintiff has within the State of Washington, at its agency in Seattle, scores of employees

consisting of a manager, bookkeepers, stenographers, clerks and teamsters, and that the prosecution of all of said agents, under Section 3861 of Remington's Compiled Statutes, would utterly disrupt and ruin the plaintiff's business in said State.

XVIII

That the permit under which the plaintiff has heretofore operated in the State of Washington expired on the 30th day of June, 1926, and that the said officers have requested the Attorney General of the State of Washington to institute the aforesaid suits and the said Attorney General of the State of Washington, John H. Dunbar, is about to institute and bring suits as aforesaid. And the said officers have requested the prosecuting attorneys of the State of [fol. 11] Washington to file informations against plaintiff's agents, and they are about to have plaintiff's agents arrested.

For a second cause of action plaintiff complains and alleges:

I

Plaintiff realleges Paragraph I of its First Cause of Action.

II

Plaintiff realleges Paragraph II of its First Cause of action.

III

Plaintiff realleges Paragraph III of its First Cause of Action.

IV

Plaintiff realleges Paragraph IV of its First Cause of Action.

V

Plaintiff realleges Paragraph V of its First Cause of Action.

VI

Plaintiff realleges Paragraph VI of its First Cause of Action.

VII

Plaintiff realleges Paragraph VII of its First Cause of Action.

VIII

Plaintiff realleges Paragraph VIII of its First Cause of Action.

IX

Plaintiff realleges Paragraph IX of its First Cause of Action.

X

Plaintiff realleges Paragraph X of its First Cause of Action.

XI

That at the time The Cudahy Packing Company qualified to do business in the State of Washington no annual license fees were imposed by the said State of Washington upon either domestic or foreign corporations doing business in said State, and that no annual license fees were imposed until the year 1897, when by Chapter 70, Session [fol. 12] Laws of 1897, which remained in effect until 1907, an annual license fee of $10.00 was imposed upon every corporation having capital stock, thereafter the said annual license fee was increased to $15.00 by Chapter 140, Session Laws of 1907.

By Chapter 144, Session Laws of 1923, every corporation having its articles of incorporation on file in the office of the Secretary of State was required to pay certain annual license fees in proportion to its authorized capital stock at the same rates as those prescribed by Chapter 149, Laws Extraordinary Session 1925, on capital up to and including $2,000,000.00, but above $2,000,000.00 the annual license fee prescribed was $1.00 for each $1,000,000.00, or fraction

thereof, of authorized capital. That during this period the plaintiff paid an annual license fee of $183.00.

By said Chapter 149, Laws Extraordinary Session 1925, the license fee imposed upon foreign corporations having a capital stock above $2,000,000.00 was increased from $1.00 to $10.00 for each $1,000,000.00, or fraction thereof, but with the provision that the total amount of such annual license fee should in no case exceed $3,000.00.

That the plaintiff paid for the year 1926, under protest, an annual license fee of $480.00. That if the plaintiff is required or is compelled to file its supplemental articles increasing its stock to $45,000,000.00 it will be compelled to pay an annual license fee of $580.00.

XII

That in addition to the taxes paid the Secretary of State, as aforesaid, the plaintiff has annually paid all the State, County and City taxes assessed and levied against its property situate in the State of Washington, the taxes for the year 1926 amounting to $1575.67.

XIII

Section 3, Chapter 149, Session Laws of the State of Washington 1925, amending Section 3841 of Remington's Compiled Statutes, provides:

"Every corporation incorporated under the laws of this state, and every foreign corporation, having its articles of incorporation on file in the office of the secretary of state, shall, on or before the first day of July of each and every year, pay to the secretary of state, for the use of the state, the following license fees in proportion to its authorized [fol. 13] capital stock, as follows:

Capital in excess of $50,000.00, and up to and including $100,000.00, Fee $25.00.

Capital in excess of $100,000.00, and up to and including $500,000.00, fee $50.00.

Capital in excess of $500,000.00, and up to and including $1,000,000.00, fee $100.00.

Capital in excess of $1,000,000.00, and up to and including $2,000,000.00, fee $150.00; and $10.00 for each $1,000,-

000.00 or fraction thereof of capital in excess of $2,000,000.00: Provided, however, That the total amount of such annual license fee shall in no case exceed $3,000.00. Every corporation failing to pay the said annual license fee, on or before the first day of July of any year, and desiring to pay the same thereafter, and before the first day of January next following, shall pay to the secretary of state, for the use of the state, in addition to the said license fee the following further fee, as a penalty for such failure, the sum of two dollars and fifty cents: Provided, however, That building and loan and savings and loan associations paying special fees provided for in the act under which same are incorporated shall not be required to pay the regular fees provided herein: Provided, further, That the annual fee required to be paid to the department of public works by any public service company shall be deducted from the annual fee provided herein, and the excess only shall be collected under this act."

That these classifications are arbitrary and fanciful and deprive the plaintiff of equal protection of the law in that plaintiff's business and property both without as well as within the state are taxed while the other corporations are exempt as to their business and property beyond the state.

XIV

By Section 3842 of Remington's Compiled Statutes of Washington it is provided:

"That no corporation shall be permitted to commence or maintain any suit, action, or proceeding in any court of this state without alleging and proving that it has paid its annual license fee last due."

By the same Section it is provided:

"That failure upon the part of any corporation to pay its annual license fee for the period of one year from and after the date when such payment should become due shall be prima facie evidence of the insolvency of such corporation, and the fact of such insolvency may be shown by the state or by any private person or corporation."

By said Section it is further provided that:

"It shall be the duty of the Secretary of State to strike from the records of his office the names of all corporations which have neglected for the period of two years to pay their annual license fees; and any corporation thereafter organized may take and shall have the exclusive right to use the corporate name of any corporation so stricken from the records."

[fol. 14] By Section 3843 of Remington's Compiled Statutes of Washington, as amended by the Laws of 1923, Chapter 144, Section 5, and subsequent sections, it is provided that if a corporation whose name has been stricken from the records of the Secretary of State for failure to pay its annual license fee for two years may be reinstated at any time within three years after its name has been stricken from the records by paying to the Secretary of State all license fees and penalties then due from it and the additional sum of $10.00 for each and every year that its name has been stricken from the records, but that if within the period named such corporation shall have not made such application then the Secretary of State shall enter upon his records a notation that such corporation is dissolved and that it shall thereafter be dissolved and the trustees of such corporation shall hold the title to its property for the benefit of its stockholders and creditors to be disposed of under appropriate court proceedings.

XV

It is also provided by Section 3842 of Remington's Compiled Statutes of Washington that the State Board of Tax Commissioners may institute suits to enforce the payment of any license fee due from any corporation under the above mentioned laws.

XVI

That some time prior to the 30th day of June, 1927, the plaintiff appeared before the Hon. Jay Grant Hinkle, Secretary of State of the State of Washington, and the Hon. William G. Potts, Treasurer of the State of Washington, and demanded the issuance to the plaintiff of a license to

do business in the State of Washington for the year ending June 30th, 1928, and at the same time tendered to them the sum of $15.00, but the said officers, acting under the pretended authority of said Chapter 149, Laws Extraordinary Session 1925, declined and refused to issue to the plaintiff any license to do business in the State of Washington from and after June 30th, 1927, unless and until [fol. 15] the plaintiff should pay as a condition precedent to the issuance of such license, a fee of $545.00, for the filing of its certificate of increase of its capital stock and the sum of $580.00 as an annual license fee computed on the basis of said Chapter 149, Laws Extraordinary Session 1925. That the plaintiff was then and there informed by the officers that unless it paid the fee demanded by them the Secretary of State would refuse to issue to the plaintiff any license permitting it to do business in the State of Washington for the year commencing July 1st, 1927, and subsequent years, and would at the times fixed in the said laws above mentioned in this paragraph strike the plaintiff's name from the records of his office and enter thereon a notation of the plaintiff's dissolution as a corporation; and said officers further informed the plaintiff that it would be deprived, on and after the 1st day of July, 1927, of the right to commence or maintain any action, suit or proceeding in any court of the State of Washington, would be under a presumption of insolvency and under a constant threat and danger of receivership and in danger of the loss of its name to some other corporation thereafter organized.

XVII

That as heretofore alleged, any corporation whose right to do business shall be thus forfeited shall be denied the right to sue and defend in any of the courts of this State, except in a suit to forfeit the charter of such organization, and in any suit against such corporation on a cause of action arising before such forfeiture no affirmative relief shall be granted to such corporation unless its right to do business in this State shall be rivived. That the plaintiff cannot conduct business in the State of Washington without resort to the courts of said State because ninety-five per cent of all of its causes of action arising from the sale of its goods,

wares and merchandise, in the State of Washington are below the minimum jurisdiction of the Federal Courts and must be litigated, if at all, in the State Courts, and in addition thereto, the plaintiff is liable, at any time, to be sued in the State courts under such conditions as to the parties or as to the amount involved as it could not remove the con- [fol. 16] troversy to the Federal Court, and if its right to do business within the State if forfeited under the pretended laws, aforesaid, it can interpose no defense to such actions. That the plaintiff has no adequate remedy at law for its protection against the consequences of the enforcement against it of the said unconstitutional laws and will be without remedy unless it can secure such relief as only a court of equity can grant by way of injunction.

XVIII

That the plaintiff, as aforesaid. refused to pay the fee demanded for the filing of its certificate of increased capital and *id* then and there also refuses to pay the annual license fee demanded of it by the said State officers, and the said officers did, after the 1st day of July, 1927, notify the State Board of Tax Commisioners of the State of Washington of the delinquency of the plaintiff, and the State Board of Tax Commissioners, under the authority of the aforesaid Statute, through John H. Dunbar,. Attorney General, are threatening to institute suit against the plaintiff to enforce the payment of the license fee claimed by the aforesaid officers to be due from the plaintiff under the above mentioned law.

XIX

That the plaintiff will not apply to the Secretary of State for a permit to do business in the State of Washington, nor meet the conditions necessary for the success of such application, which are the payment of the fees aforesaid, nor will the plaintiff pay a franchise or annual license fee under said unconstitutional laws for the fiscal year ending June 30th, 1928. That Jay Grant Hinkle, Secretary of State, has informed the plaintiff that he is about to forfeit on the books of his office the right of the plaintiff to do business in the State of Washington and is about to bring this fact to the

attention of the plaintiff's debtors and to every person having a claim against the plaintiff and is about to issue a certificate to that effect to such persons, whereby the courts of the State will be closed to the plaintiff, his certificate being [fol. 17] made proof under the laws of Washington of facts so certified. And the said John H. Dunbar, as Attorney General, is already threatening to institute a suit or suits against the plaintiff for the collection of penalties for the non-payment of the franchise or annual license tax and to oust it from doing business in the State of Washington, and criminal actions are about to be instituted against all of the agents of plaintiff in the State of Washington, and the said defendants, acting under what they conceive to be their duties under said pretended laws, are harrassing, annoying and impeding the plaintiff in its just right to transact its interstate commerce in the State of Washington and the business inseparable therefrom, as aforesaid. That plaintiff will be deprived of its right to do its interstate business and the business incident thereto in the State of Washington in violation of its right guaranteed to it under the Constitution of the United States in Article 1, Section 8, Paragraph 4, which grants to Congress the power to regulate commerce with the foreign nations, among the several states, and with the Indian tribes; and under the 14th amendment to the Constitution of the United States, and the first section thereof, which guarantees the plaintiff against being deprived by any State of its property without due process of law, and against being denied the equal protection of the laws.

XX

That Roland H. Hartley is the duly elected and acting Governor of the State of Washington, and that he can be found in the City of Olympia, County of Thurston, in the Western District of Washington.

Wherefore plaintiff prays that the defendant, Jay Grant Hinkle, as Secretary of State, be restrained and enjoined, pending this suit, from undertaking in any manner to enforce against the plaintiff, or any of its officers, agents, or

stockholders, the permit or annual franchise tax laws of the State relating to foreign corporations and from making any entries in the books of his office signifying that the permit of the plaintiff to do business in the State of Washington has been forfeited, and from issuing any certifi-
[fol. 18] cates to any person whomsoever to the effect that the permit of this plaintiff to do business in the State of Washington has been forfeited; and that the defendant, John H. Dunbar, as Attorney General, be restrained and enjoined from attempting to in any wise enforce against the plaintiff the permit and annual license fee or franchise tax laws of the State of Washington relating to foreign corporations, and from instituting any suit for the collection of any franchise tax or annual license fees or penalties or any suit to cancel the permit of the plaintiff to do business in the State of Washington on the ground that it has failed to pay the annual fees required by the laws of the State of Washington for foreign corporations doing business therein, and from instituting any suit against the plaintiff to enjoin it from transacting business in the State of Washington based on the failure of the plaintiff to pay said permit fee or franchise taxes, and that said injunctions, on a final hearing, be perpetuated, and that the plaintiff recover from the defendants its costs, and for such other and further relief as it may be entitled to in the premises.

Plaintiff further prays that His Excellency, Roland H. Hartley, the Governor of the State of Washington, and each of the defendants have due notice of its application for an injunction herein, and that a subpœna issue to each of the defendants according to the practice in equity, requiring them and each of them to answer this bill, but not under oath, the oath of the defendants being hereby expressly waived; and as in duty bound plaintiff will ever pray.

The Cudahy Packing Company, by Palmer, Askren & Brethorst, E. B. Palmer, Thos. M. Askren, S. W. Brethorst, Solicitors for Plaintiff.

[fol. 19] *Duly sworn to by E. B. Palmer. Jurat omitted in printing.*

[fols. 20 & 21] Summons and Marshal's return, filed September 3, 1927, omitted in printing.

[fol. 22] In United States District Court

[Title omitted]

Order Setting Cause for Hearing—Filed Sept. 19, 1927

The Bill of Complaint in foregoing cause having been this day presented to me, Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division, and it appearing therefrom the same seeks an interlocutory injunction restraining the action of certain officers of the State of Washington in the enforcement or execution of certain statutes of the State of Washington, I have this day called to my assistance to hear and determine such application, the Honorable Frank S. Dietrich, United States Circuit Judge for the Ninth Circuit, and Honorable George M. Bourquin, United States District Judge for the District of Montana, and they having consented to serve in that capacity.

And it is thereupon ordered that the said application for interlocutory injunction, prayed for in the Bill of Complaint in this cause, be set down for hearing before the three Judges above named, in the United States District Court Room, at Tacoma, Washington, on Saturday, September 24th, 1927, at 10 o'clock A. M., or such time thereafter as it may be heard, and that notice of such hearing be given to each of the defendants in this cause and to His Excellency Roland H. Hartley, Governor of the State of Washington, by delivery to them and each of them of a certified copy of this order, in conformity with the provisions of [fol. 23] Section 266 of the Judicial Code of the United States.

In Chambers, at Seattle, Washington, this 19 day of September, 1927.

Edward E. Cushman, United States District Judge.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF SERVICE—Filed June 6, 1928

STATE OF WASHINGTON,
County of King, ss:

E. B. Palmer, being first duly sworn, upon oath deposes and says:

That at all times herein mentioned I have been and am now a citizen of the United States and a resident of the State of Washington, over the age of twenty-one years, not a party to or interested in the above entitled action and competent to be a witness therein.

That on the 19th day of September, 1927, I received three certified copies of the order entered herein on the 19th day of September, 1927, fixing the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is hereto attached, and that on the 19th day of September, 1927, I duly served a certified copy of said order entered herein on the 19th day of September, 1927, giving notice of the hearing on plaintiff's petition for an interlocutory injunction upon His Excellency, Roland H. Hartley, he being Governor of the State of Washington and residing at Olympia, Washington, by delivering to and leaving with the said Roland H. Hartley, Governor of the State of Washington, personally, in the City of Olympia, State of Washington, a certified copy of the said original order entered herein on the 19th day of September, 1927, which order fixed the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is at-
[fol. 25] tached hereto.

That on the 19th day of September, 1927, I duly served the said order herein filed on the 19th day of September, 1927, which order fixed the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is attached hereto, upon Jay Grant Hinkle, Secretary of State and one of the defendants named in said action, by delivering to and leaving with said Jay Grant Hinkle, personally, in the City of Olympia, State of Washington,

a certified copy of the said original order entered herein on the 19th day of September, 1927, which order fixed the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is attached hereto.

That on the 19th day of September, 1927, I duly served the said order herein filed on the 19th day of September, 1927, which order fixed the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is attached hereto, upon John H. Dunbar, Attorney General of the State of Washington and one of the defendants named in said action, by delivering to and leaving with the said John H. Dunbar, personally, in the City of Olympia, State of Washington, a certified copy of the said original order entered herein on the 19th day of September, 1927, which order fixed the date of hearing on plaintiff's petition for an interlocutory injunction, a correct copy of which is hereto attached.

E. B. Palmer.

Subscribed and sworn before me this 6th day of June, 1928. S. W. Brethorst, Notary Public in and for the State of Washington, Residing at Seattle, Wash. (Seal.)

[File endorsement omitted.]

[fol. 26] In United States District Court

[Title omitted]

Motion To Dismiss—Filed Sept. 20, 1927

Come now the defendants Jay Grant Hinkle, secretary of state, and John H. Dunbar, attorney general of the state of Washington, and each of them, by John H. Dunbar, attorney general, and L. B. Donley, assistant attorney general, their solicitors, and move the court to dismiss the complaint in equity filed herein for the reasons and upon the grounds that, as it appears upon the face thereof:

I

Said complaint in equity does not state any matters of equity entitling the plaintiff to the relief prayed for.

II

Said complaint in equity does not state facts sufficient to entitle the plaintiff to any relief against these defendants.

John H. Dunbar, Attorney General, L. B. Donley, Assistant Attorney General, Solicitors for Defendants.

Service of the foregoing motion to dismiss by receipt of copy acknowledged this 19th day of September, 1927.

Palmer, Askren & Brethorst, Solicitors for Plaintiff.

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE—Filed May 8, 1928

This cause having come on regularly for hearing in this court on the 22nd day of September, 1927, upon the defendants' motion to dismiss the bill of complaint filed herein, plaintiff being represented by Messrs. E. B. Palmer, Thos. M. Askren, and S. W. Brethorst, its solicitors, and the defendants being represented by John H. Dunbarm, Esq., Attorney General of the State of Washington, and L. Donley, Esq., his assistant, their solicitors, and the Court having heart arguments of counsel and having considered the briefs of the respective parties and having on the 9th day of January, 1928, filed its written opinions;

Now, on this 28th day of April, 1928, the parties herein now appearing by their respective counsel, on the motion of the defendants, pursuant to such decision of the Court,

It is by the Court hereby ordered, adjudged, and decreed that said motion to dismiss be, and it is hereby granted upon the sole ground that the bill of complaint does not

[fol. 28] state facts sufficient to entitle plaintiff to any relief against the defendants; and that said bill of complaint and causes of action be and the same hereby are dismissed, and that the defendants have and recover their costs and disbursements herein, to which the plaintiff excepts and its exception is allowed.

Dated at San Francisco, May 3rd, 1928,

Frank S. Dietrich, Circuit Judge.

Dated at Tacoma, April 28, 1928.

Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE—Filed June 7, 1928

This cause having come on regularly for hearing in this court on the 22nd day of September, 1927, upon the plaintiff's petition for an interlocutory injunction, the plaintiff being represented by Messrs. E. B. Palmer, Thos. M. Askren and S. W. Brethorst, its solicitors, and the defendants being represented by John H. Dunbar, Esq., Attorney General of the State of Washington, and L. B. Donley, Esq., his assistant, their solicitors, and the Court having heard arguments of counsel and having considered the briefs of the respective parties, and having on the 9th day of January, 1928, filed its written opinions,

Now, on this 7th day of June, 1928, the parties herein appearing by their respective counsel, S. W. Brethorst, attorney for plaintiff, and L. B. Donley, Asst. Atty. General, on the motion of the defendants, pursuant to such decision of the Court, the Court having heretofore dismissed the bill of complaint,

It is by the Court hereby ordered, adjudged, and decreed that said petition of the plaintiff for an interlocutory injunction against the defendants be, and it is hereby, denied;

to which the plaintiff excepts and its exception is allowed. This order amends the decree and order of dismissal en-
[fol. 30] tered May 8th, 1928.

Dated this 7th day of June, 1928.

George M. Bourquin, District Judge, by Edward E. Cushman, District Judge. Edward E. Cushman, United States District Judge of the Western District of Washington, Southern Division. Judge Frank S. Dietrich, Circuit Judge.

Concurs in this order: Edward E. Cushman, District Judge.

OK as to form. John H. Dunbar, Atty. Gen., L. B. Donley, Asst. Atty. Gen., Solicitors for Defendants, John H. Dunbar, Atty. Gen., and J. Grant Hinkle, Sec. of State.

[File endorsement omitted.]

[fol. 31] In United States District Court

[Title omitted]

Palmer, Askren & Brethorst, Seattle, Attorneys for Plaintiff.

John H. Dunbar, Attorney General; L. B. Donley, Ass't, Olympia, Attorneys for Defendants.

Before Statutory Court: Dietrich, Circuit Judge, and Bourquin and Cushman, District Judges

Opinion—Filed Jan. 9, 1928

Cushman, (D. J.):

Plaintiff, a corporation, organized under the laws of the state of Maine, sues to enjoin the enforcement of the statutes of Washington requiring of corporations the payment of certain amounts of money, called in the Acts: the one "a filing fee" and the other an "annual license fee." While plaintiff asks an interlocutory injunction the matter is before the court upon motion to dismiss for want of equity and a failure of the bill to state facts entitling plaintiff to relief.

Complaint is made that these Acts in question will deprive plaintiff of property without due process of law, and that they deny to plaintiff equal protection of the law, and violate the Commerce Clause, Art. I, Sec. 8, Clause 3, of [fol. 32] the Constitution. It is alleged that plaintiff about Forty years ago engaged in business in the State of Washington and has since been engaged therein, in interstate and foreign commerce, that it has been actively engaged in interstate commerce between each and every one of the states, and foreign commerce; that its principal office is in the City of Portland, Maine, and that for the purpose of facilitating the transaction of its interstate business it has established agencies in all the states of the Union; that in Washington, its only agency is a warehouse and sales office; that its only property in Washington is a lease of a warehouse and refrigeration system and fixtures therein, which is of a total value of about $40,000.00; that none of its traveling salesmen take orders for goods, save such as plaintiff ships into the state direct to the purchaser or to its warehouse for the purpose of filling orders therefor; that its goods, warehoused in Washington consist in most part of original and unbroken packages shipped into the state and which are in large part, reshipped and resold in original and unbroken packages in foreign commerce; that its intrastate and interstate commerce are so inextricably interwoven that they cannot be separated; that of its goods sold in the year ending in October, 1926, less than 6/10 of 1 per cent of its entire business was done in the State of Washington, (In round numbers) its goods sold for such year being in excess of $231,000,000,—its Washington sales less than $1,325,000, and that more than one-half of its sales made in the State of Washington, and more than one-half of its merchandise handled in its branch office in Washington, were in interstate and foreign commerce; that less than 4/10 of 1 per cent of its wages and salaries paid were earned in the State of Washington, such amount being a little less than $67,000.00.

[fol. 33] Subsequent to 1919, plaintiff increased its capital stock from $35,000,000. to $45,000,000., of which authorized capital but $29,800,000.00 have been issued, and that all of its property does not exceed in value the amount

of its capital stock issued. The supplemental articles evidencing such increase have not been filed with the Secretary of State of Washington. Until the law of 1925, presently to be mentioned, no law of the State required the filing of a certificate of the increase or decrease of capital stock. Sections 1 and 2, Chapter 149 of the laws of the State of Washington, of the Extraordinary Session of 1925, (Laws of 1925, Page 417) amended Sec. 3836 and 3837 of Remington's Comp. Stat., to read:

Sec. 3836. " Every corporation incorporated under the laws of this state, or of any state or territory in the United States or of any foreign state or country, required by law to file articles of incorporation in the office of the secretary of state, shall pay to the secretary of state a filing fee in proportion to its authorized capital stock as follows: * * * Capital of $1,000,000.00 or more, and less than $2,000,000.00, fee $750.00; and $10.00 additional for each $1,000,000.00, or major fraction thereof, or capital stock in excess of $2,000,000.00 provided, however, That the total filing fee for filing such articles of incorporation shall in no case exceed the sum of $3,000.00;"

Sec. 3837. "Every corporation, foreign or domestic, desiring to file in the office of the secretary of state articles amendatory or supplemental articles increasing its capital stock, or certificates of increase of capital stock, shall pay to the secretary of state the fees prescribed in the preceding section for the total amount to which the capital stock of the corporation is so increased, less the amount already paid for filing the original articles of incorporation, or original articles and amendatory or supplemental articles, or certificates of increase, and every such corporation desiring to file amendatory of supplemental articles decreasing, or certificates of decrease of capital stock, shall pay to the secretary of state a filing fee of $25.00. For filing of other amendatory or supplemental articles, it shall pay a fee of $10.00, provided, however, That the total amount paid by any corporation for filing its original articles of incorporation and all of its articles amendatory or supplemental articles increasing its capital stock or certificates of increase of capital stock, shall in the aggregate in no case exceed the sum of $3,000,000.00, plus $10.00 for each separate in-

strument filed in addition to its original articles of incorporation * * *."

[fol. 34] Chapter 147 of the laws of the Extraordinary Session (Laws of 1925, Page 410) amended Sec. 3853 of Remington's Comp. Stat., to read as follows:

"Such corporation shall cause to be filed in the office of the secretary of state * * * and a certified copy of each and all of its certificates of increase of its capital stock."

Sec. 3855 provides:

"Any foreign corporation doing business in this state which shall fail to comply with the provisions of the two preceding sections, shall be subject to a penalty of two hundred and fifty dollars to be recovered in a civil action to be instituted by the attorney general in the name of the state of Washington, upon his being furnished with a sworn statement of facts sufficient to justify such action."

Sec. 3861 provides:

"Any agent of any foreign corporation, conducting or carrying on business within the limits of this state, for and in the name of such corporation, contrary to any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for a term not exceeding three months, or by both such fine and imprisonment."

It is alleged that in 1926, plaintiff tendered the Secretary of State for filing, its certificate of increase of capital stock together with a filing fee of $10.00, which was refused, the Secretary demanding $580.00 less $35.00 in fees already paid. It is to be inferred that such demand was made under the foregoing provisions of law.

It is alleged that plaintiff has scores of traveling salesmen in the State of Washington and scores of other employes; that plaintiff upon refusing to pay the filing fee provided for by Chapter 149, was informed by the Secretary of State and State Treasurer of the State of Washington, that unless paid they would request the Attorney

General to institute a civil action against plaintiff under [fol. 35] Sec. 3855, supra, and to prosecute the agents of plaintiff carrying on business in the State, under Sec. 3861, supra, and that such suits are about to be brought. It is alleged that the prosecution of such agents would ruin plaintiff's business in the State.

Sec. 3 of Chap. 149 of the laws of the Extraordinary Session of 1925, (Laws of 1925, Page 418), amended Sec. 3841 of Remington's Comp. Stat., to read as follows:

"Every corporation incorporated under the laws of this state, and every foreign corporation, having its articles of incorporation on file in the office of the secretary of state, shall, on or before the first day of July of each and every year, pay to the secretary of state, for the use of the state, the following license fees in proportion to its authorized capital stock, as follows: * * * Capital in excess of $1,000,000.00 and up to and including $2,000,000.00, fee $150.00; and $10.00 for each $1,000,000.00 or fraction thereof of capital in excess of $2,000,000.00: provided however, That the total amount of such annual license fee shall in no case exceed $3,000.00. Every corporation failing to pay the said annual license fee, on or before the first day of July of any year, and desiring to pay the same thereafter, and before the first day of January next following, shall pay to the secretary of State, for the use of the state, in addition to said license fee the following further fee, as a penalty for such failure, the sum of two dollars and fifty cents; * * *"

Sec. 3842, Remington's Comp. Stat., provides:

"No corporation shall be permitted to commence or maintain any suit, action or proceeding in any court of this state, without alleging and proving that it has paid its annual license fee last due. * * * The state board of tax commissioners may institute suits to enforce the payment of any license fee, due from any corporation under this or any other law. Failure upon the part of any corporation to pay its annual license fee for a period of one year, from and after the date when such payment first became due, shall be prima facie evidence of the insolvency of such corporation, and the fact of such insolvency may be

shown by the state or by any private person or corporation; * * * It shall be the duty of the secretary of state to strike from the records of his office the names of all incorporations which have neglected for a period of two years to pay their annual license fees; and any corporation thereafter organized may take and shall have the exclusive right to use the corporate name of any corporation so stricken from the records; * * *."

Sections 3843 and 3844 as amended by Chapter 144 of the Laws of Washington of 1923, Secs. 5 and 6, (Laws of 1923, [fol. 36] Page 465) provided for reinstating within three years of a corporation whose name has been stricken from his records, by the Secretary of State, and the conditions upon which it may be so reinstated.

Sec. 3846 provides:

"Every corporation whose name has been or shall hereafter be, stricken from the records of the office of the Secretary of State in pursuance of law for failure to pay its annual license fee for two years, is hereby authorized and permitted to apply to the Secretary of State for reinstatement at any time within three years after its name has been stricken from the records of the office of the Secretary of State. Any corporation stricken from the records and dissolved, as provided in this chapter, may at any time thereafter hold a meeting of stockholders, in the same manner as provided during its corporate existence, and pass such resolutions as may be necessary to close out its affairs and wind up the business of such corporation, and where such stricken and dissolved corporation has heretofore held such meetings of stockholders for the purpose of passing resolutions to wind up its affairs, such method of procedure is hereby validated and approved."

It is alleged that in 1927, plaintiff tendered to the Secretary of State, and State Treasurer, $15.00 and demanded a license to do business in the State of Washington, but that these officers acting under Chapter 149, supra, refused such license unless plaintiff pay for filing its certificate of increase a fee of $545.00 and the annual license fee of $580.00; that upon refusal of plaintiff to pay the annual license fee said state officers informed plaintiff unless the same was

paid, 'the Secretary of State would refuse to issue to the plaintiff any license permitting it to do business in the State of Washington for the year commencing July 1st, 1927, and subsequent years, and would at the times fixed in the said laws above mentioned in this paragraph strike the plaintiff's name from the records of his office and enter thereon a notation of the plaintiff's dissolution as a corporation; and said officers further informed the plaintiff [fol. 37] that it would be deprived on and after the 1st day of July, 1927, of the right to commence or maintain any action, suit or proceeding in any court of the State of Washington, would be under a presumption of insolvency and under a constant threat and danger of receivership and in danger of the loss of its name to some other corporation thereafter organized'. That said officers have notified the State Board of Tax Commissioners under the authority of the aforesaid Sec. 3842, of the delinquency of plaintiff, and said Board through the Attorney General is threatening suit to enforce the payment of such license fee. That the Secretary of State has informed plaintiff that he is about to forfeit, on the books of his office, the right of plaintiff to do business in the State, and to advise plaintiff's debtors and those having claims against it of that fact, and is about to issue a certificate to that effect to such persons, and that the Attorney General is threatening to institute suits against plaintiff for penalties for nonpayment of its license tax,—to oust it from doing business in the State of Washington, and commence actions against all of plaintiff's agents in the State; that this will deprive plaintiff of its right to do interstate business and business incidental thereto in the State of Washington.

Plaintiff cites: Hanover Fire Ins. Co., v. Carr, 272 U. S. 494; Western Union Tel. Co., v. Kansas, 261 U. S. 1; Pullman Co. v. Kansas, 216 U. S., 56; Cheney Bros. Co. v. Massachusetts, 246 U. S. 147; Air-Way Electric Appliance Corp., v. Day, 266 U. S., 71; Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203; Ludwig v. Western Union Tel. Co., 216 U. S. 146; Atchison etc., Ry. Co., v. O'Connor, 223 U. S. 280; International Textbook Co. v. Pigg, 217 [fol. 38] U. S. 91; Bucks Stove & Range Co. v. Vickers, 266 U. S. 205; Baltic Mining Co. & White Dental Mfg. Co. v. Massachusetts, 231 U. S. 68; Looney v. Crane Co., 245 U. S.

178; International Paper Co. v. Massachusetts, 246 U. S. 135; Roberts & C. Co v. Emmerson, 271 U. S. 50; O'Gara Coal Co. v. Emerson, 156 N. E. (Ill.) 814; Perkins Mfg. Co. v. Jordan, 254 Pac. (Cal.) 551; Smith v. Reeves, 178 U. S. 436; Exparte Young, 209 U. S. 123; Western Union Tel. Co. v. Andrews, 216 U. S. 165; Meyer v. Wells Fargo Co., 233 U. S. 298; Adams Express Co. v. New York, 232 U. S. 14; Indiana Mfg. Co. v. Koene, 188 U. S. 681; State Ex Rel Barber Co. v. Hinkle, 138 Wash. 72; Lamont Corliss & Co. v. Hinkle, 136 Wash. 285; Bank of Kentucky v. Stone, 88 Fed. 383; Barrett v. New York, 232 U. S., 14;

In addition to a number of the foregoing, the defendant cites: Great Northern Ry. Co. v. Stevens Co., 106 Wash. 238; Dowe v. City of Chicago, 78 U. S. 108; Grand Chute v. Winegar, 82 U. S. 373; Hannewinkle v. Georgetown, 82 U. S. 547; State R. R. Tax Cases, 92 U. S. 575; Shelton v. Platt, 139 U. S. 591; Allen v. Pullman Car Co., 139 U. S. 658; Pittsburg Etc. Ry. Co. v. Board of Public Works, 172 U. S. 32; Arkansas Bldg. & Loan Ass'n. v. Madden, 175 U. S. 269; Cruickshank v. Bidwell, 176 U. S. 73; Boise Artesian Water Co. v. Boise, 213 U. S. 276; Dalton Add. Machine Co. v. State Corp. etc., 236 U. S. 699; St. Louis & S. W. Ry. Co. v. Arkansas, 235 U. S. 350; Kansas City Etc., Ry. Co. v. Stiles, 242 U. S. 111; Virginia Signal Co. v. Virginia 246 U. S. 500; Locomobile Co. of America v. Massachusetts, 246 U. S. 146;

Plaintiff's case comes to this: Unless the case of Baltic Mining Co. v. Massachusetts. and the White Mfg. Co. v. Massachusetts, 231 U. S. 68, often spoken of as the Baltic Mining Co. case have been overruled in so far as they would apply to a case such as the present, plaintiff cannot prevail. [fol. 39] It is contended that the case is overruled by the following: Looney v. Crane Co., 245 U. S. 178; International Paper Co. v. Massachusetts, 246 U. S. 135, Cheney Bros. Co. v. Massachusetts, 246 U. S. 147; Air-Way Elec. Appliance Corp. v. Day, 266 U. S. 71; Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203; Hanover Fire Ins. Co. v. Carr, 272 U. S., 494.

First, the contention is that the Baltic Mining Co. case, in which the excise tax measured by the authorized capital stock with a maximum of $2,000.00 was upheld, in a suit by a foreign corporation engaged in interstate and intrastate

business in the taxing state, has been expressly overruled by Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203. In the latter case the court said:

"It must now be regarded as settled that a State may not burden interstate commerce or tax property beyon*f* her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of the Baltic Mining Co. v. Mass. 231 U. S. 68,87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."

The Alpha Portland Cement Company was engaged solely in interstate commerce, and any license fee or tax was for that reason bound to be a charge or burden upon such commerce. Courts have many times had occasion to say, in effect, that in considering the language used in a decision, the particular point considered should always be borne in mind. The court called attention to this subject in the Baltic Mining Co., and S. S. White Mfg. Co. v. Commonwealth of Massachusetts:

Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases."

[fol. 40] In the case of Air-Way Corp. v. Day, supra, there was no maximum fixed for the annual license fee; the brief of appellant, page 73 of the report, shows that the attack upon the law was because there was not a reasonable limitation in the maximum amount of this fee. The appellant in that case besides using property owned by it in the state upon which it paid a general property tax, did an annual intrastate business amounting to $70,802.30; for the right of doing which business the lower court upheld an annual fee of $14,926., being about 21 per cent of

the intrastate business done. Consideration was given by the Supreme Court to the amount of this charge; the court in reversing the lower court saying:

"The fee determined by the lower court, as well as that fixed by the State officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed; it may be said that some relation to such value is a reasonable requirement. Indeed, under the constitution and laws of Ohio, a tax on value of the privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value thereafter. Southern Gum Co. v. Laylin, 66 Ohio St. 578. That value depends on the 'property owned and used and business transacted' in Ohio. Sec. 8728-11."

In the instant case, for the right to do an annual intrastate business transacted becoming a burden upon plaintiff's interstate business than was true in the foregoing case.
an annual license fee of $580.00 It is obvious, other things being equal, that there is far less danger of such a fee or tax,—less than 1/10 of 1 per cent,—upon the intrastate business than was true in the foregoing case.
[fol. 41] In Cheney Bros. Co. v. Massachusetts, 246 U. S., 147, the act regulating the amount of an excise tax for doing business by the par value of its authorized capital stock with a maximum of $2,000 upon such tax, the same sections of the Massachusetts law were considered by the court that it had considered in the Baltic Mining Company case, and were held valid as to those corporations doing both local and interstate business and void as to a company solely engaged in interstate business. Of one of the companies doing an interstate and local business, it was said:

"This company was incorporated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from

retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this is a domestic business,—inducing one local merchant to buy a particular class of goods from another,—and may be taxed by the State regardless of the motive with which it is conducted."

In International Paper Co. v. Massachusetts, 246 U. S., 135, a statute of Massachusetts removing such $2,000.00 limit on the maximum amount of such excise tax was held invalid, the suit being one by a foreign trading corporation largely engaged in interstate commerce, and whose business and property was largely in other states.

In this case, the court said of the Baltic Mining Company case:

"In holding otherwise the state court failed to observe the restricted and limited grounds of our rulings in Baltic Mining Co. v. Massachusetts and the other cases dealt with and distinguished in the excerpt just quoted from our opinion in Looney v. Crane Company. True, the tax sustained in Baltic Mining Co. v. Massachusetts was imposed under the first of the statutes now in question, the one of 1909; but at that time the statute placed a maximum limit on the amount of tax which as shown in that and other cases, was a material factor in the decision."

[fol. 42] In Looney v. Crane Co., 245 U. S., 178, a Texas statute imposing upon corporations permit charges and excise taxes, both charges being without a maximum fixed as to their amount, in a suit by a foreign trading corporation engaged largely in interstate business, was held invalid. This case follows the rule laid down in Western Union Telegraph Co. v. Kansas, 216 U. S., 1; Pullman Co. v. Kansas, 216 U. S., 56; Ludwig v. Western Union Telegraph Co., 216 U. S., 146; International Textbook Co. v. Pigg, 217 U. S., 91; A., T. & S. F. Ry. Co. v. O'Connor, 223 U. S., 280, 285.

Of cases including the Baltic Mining Company case, the court in Looney v. Crane Company said:

"But despite the controlling decisions dealing with cases in substance identical in fact and principle with the case here presented and the effect given to them in Texas as to one of the statutes here involved, it is now insisted that the statutes are repugnant to the Constitution of the United States and that error was committed in deciding to the contrary. This is rested on cases decided since those to which we have referred. Baltic Mining Co. v. Massachusetts, 231 U. S., 68; St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S., 350; Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas, 240 U. S., 227; Kansas City, Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S., 111. The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the case relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases."

The court held that the Baltic Mining Company case and other cases mentioned by it, did not overrule the Western Union Telegraph Co., and other cases. It follows that the cases relied upon as overruling the Baltic Mining Co. case, unless they go farther than the earlier cases, do not do so. Hanover Fire Ins. Co. v. Harding, 272 U. S., 494, has no bearing upon the present question.

In the case of Roberts and Schaefer Co. v. Emerson, 271 [fol. 43] U. S., 50:,—the Baltic Mining Company case was not mentioned, furthermore, that was a domestic corporation doing a purely intrastate business and the tax attacked was upheld. The court said:

"We cannot say that the value of the corporation franchise may not be measured by the number of no-par shares which may be issued rather than their value when issued."

The Supreme Court has also said, in Hump Harpin Co. v. Emerson, 258 U. S., 290:

"While a state may not use its taxing power to regulate or burden interstate commerce (United States Express Co. v. Minnesota, 223 U. S., 335; International Paper Co. v.

Massachusetts, 246 U. S., 135), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce), that the principle of the cases so holding must be regarded as a settled exception to the general rule. Maine v. Grand Trunk Ry. Co., 142 U. S., 217; Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S., 279; Flint v. Stone Tracy Co., 220 U. S., 107; United States Express Co. v. Minnesota, 223 U. S., 335; Baltic Mining Co. v. Massachusetts, 231 U. S., 68; Kansas City, Memphis & Birmingham R. R. Co. v. Stiles, 242 U. S., 111; United States Glue Co. v. Oak Creek, 247 U. S., 321, 326-327. The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

In Perkins & Co. v. Jordan, 254 Pac., 551, where there was a maximum to the amount of the license fee fixed by the statute, in a suit by a foreign corporation engaged in interstate and intrastate business, the Supreme Court of the State of California held a statute fixing such tax upon the basis of the authorized capital stock of the corporation invalid, as violating the Commerce Clause and the Fourteenth Amendment, the court saying of the Baltic Mining [fol. 44] Company case:

The so-called Baltic-Dental Case (Baltic Mining Co. and S. S. White Mfg. Co. v. Commonwealth of Massachusetts, 231 U. S., 68, 34, S. Ct. 15, L. Ed., 127) has in some respects been distinguished and in other respects definitely overruled. See Looney v. Crane Co., supra, and Alpha Portland Cement Co. v. Mass., supra."

The Supreme Court of the State of Washington in two decisions in mandamus proceedings, involving the Act of 1923, has held the annual license fee valid. Lamont, Corliss & Co. v. Hinkle, 136 Wash., 285; State Ex Rel Barber Co. v. Hinkle, 138 Wash., 72. These decisions were made upon the authority of the Batlic Mining Company case,—136 Wash., 291. The Supreme Court of Washington in this case says:

"Counsel for the petitioner relies principally upon the following decisions: Western Union Tel. Co. v. State, 216 U. S., 1; Pullman Co. v. State ex rel Coleman, 216 U. S., 56; Ludwig v. Western Union Tel. Co., 216 U. S., 146; Looney v. Crane Co., 245 U. S., 178; International Paper Co. v. Commonwealth of Massachusetts, 246 U. S., 135; Cheney Brothers Co. v. Commonwealth of Massachusetts, 246 U. S., 147; Airway Electrical Appliance Corporation v. Day, 266 U. S., 71; Ozark Pipe Line Corporation v. Monier, 266 U. S., 555; Mulford Co. v. Cury, 163 Cal., 276; 125 Pac., 236; Hirschfeld v. McCullagh, 64 Ore., 502, 127 Pac., 541, 130 Pac., 1131. In every one of these cases except the latter it seems plain that the controlling consideration inducing the court to hold the tax unconstitutional was the fact that it unduly burdened interstate commerce. In the last cited decision the Oregon court does not make it plain as to whether or not there was there involved a question of a tax burden upon interstate commerce, but it seems apparent from the authorities cited in support of its holding that its conclusion was rested wholly upon decisions of the Federal supreme court and of the California supreme court, all of which had to do with the question of a tax unduly burdening interstate commerce. We think the Oregon decision is not persuasive in support of the due process of law contention here made on behalf of Petitioner."

The effect of the foregoing decisions is, that where the maximum excise fixed by the law does not itself appear to be unreasonable in amount, and the method of its computation ignores as a basis intrastate commerce and takes for [fol. 45] that purpose the amount of the authorized capital stock that fact alone is not sufficient to invalidate the tax; but that the result, the excise demanded under the statute, must bear no reasonable relation to the intrastate busi-

ness transacted before such is the effect. It is a well known rule of law, even where there is a positive statutory prohibition of restraint of trade, that all restraint is not prohibited.

No righteous cause for complaint is stated in the bill, for it fails to show any such substantial burden imposed by these statutes upon the interstate commerce of plaintiff, or such taking of its property or such discrimination as to warrant the Court in enjoining the collection by the state officers of the fees demanded.

The motion to dismiss will be granted upon both of the grounds upon which it is made.

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

CONCURRING OPINION—Filed Jan. 9, 1928

Opinion by DIETRICH, C. J., concurring:

Defendant's first contention is that there is no basis for equitable relief for the reason that plaintiff has a plain, speedy, and adequate remedy at law, in that it could pay the demanded charges under protest and then bring an action to recover them, citing Great Northern Ry. Co. vs. Stevens County, 108 Wash. 238, 183 Pac. 65 in support of the view that such a course is available. If it be assumed that the averments of the bill do not bring the case within the reach of the rule recognized in ex parte Young 209 U. S. 123, Ludwig vs. Western Union Tel. Co., 216 U. S. 146, Adams Express Co. vs. City of New York, 232 U. S. 14, Ohio Tax Cases 232 U. S. 576, 587, Looney vs. [fol. 47] Crane Co., 245 U. S. 178, and Air-Way Co. vs. Day, 266 U. S. 71, 79, I am nevertheless of the opinion that the suit is cognizable in equity. "The remedy at law to be adequate must be a remedy at law in the Federal Court where jurisdiction in equity is sought * * * . It is not enough that there be a remedy at law in the State courts * * *." Simpkin's Fed. Proc., p. 275. And see

also Montgomery's Manual of Federal Jurisdiction (3d Ed.) See 702, 21 C. J. 42, sec. 17, Smyth vs. Ames, 169 U. S. 466, C., B. & Q. R. R. Co. vs. Osborne, 265 U. S. 14, Risty vs. Ohio R. I. P. R. Co., 270 U. S. 378, Franklin vs. Nevada-California P. Co. (9th C. C.), 264 Fed. 643. The Washington case, supra, was brought against a county. Payment here would have to be made to the State and any action for recovery must be against the State. But without its consent the State of Washington cannot be sued in its own courts and under the Eleventh Amendment to the Constitution of the United States it is exempt from suit in the federal courts. The only pertinent consent that has come under my notice is found in Sec. 886 Rem. Comp. Stat., Washington, which provides that, "Any person or corporation having any claim against the State of Washington shall have a right of action against the State, in the Superior Court of Thurston County." Within the principles above explained the restricted privilege thus conferred falls far short of providing an adequate remedy at law.

I find no substantial ground for holding invalid the provision involved in the first cause of action under which plaintiff is required to pay an initial or filing fee of $1,180, less certain credits. Without the consent of the State, foreign corporations cannot do business therein, and they may be arbitrarily excluded. Subject to the qualification that such corporations cannot be required to relinquish rights secured to them by the Constitution of the United States, the State may impose upon the privilege of entering its borders and transacting business therein such conditions as it sees fit. The rule is clearly stated in Hanover Ins. Co. vs. Harding, 272 U. S. 494, 507, together with illustrative exceptions. The case here is not thought to fall within the range of the qualifications. The fee is not intended to be a burden upon interstate commerce or a tax upon property beyond the jurisdiction of the state. It is in fact a relatively small burden and does not purport to have any relation to the amount of interstate busi- [fol. 48] ness transacted, and in fact bears none. It is a single charge for the privilege of entering the state and there exercising its corporate functions in the transaction of intrastate business, for an indefinite period. It is im-

posed alike upon all corporations transacting business in the state, including those which have no interstate transactions at all. True any exaction from a corporation engaged in both intrastate and interstate business may be said to affect the latter, but by engaging in both classes the corporation cannot in effect nullify the power of the state respecting the class which is otherwise admittedly subject to its control. If, as seems to be conceded, the state would have the power to require outright of all foreign corporations payment of such a fee in the amount of $1,180, why should we regard as invalid a law which less arbitrarily seeks to relate the fee to the magnitude and value of the privilege conferred. Touching the objection that authorized but unissued stock is not a reasonable factor to be considered, it is to be noted that the license secured upon the payment of the fee is for all time and under it the corporation may without further payment employ its entire authorized capital. True the power to issue stock is derived from the state where the corporation is organized, but the right to use the proceeds of stock so issued in carrying on business in another state is the grant of that state. Were issued stock adopted as the measure of the charge the corporation might issue but a nominal amount, procure entrance in a foreign state upon that basis, and thereupon issue all of its authorized capital stock, thus evading the payment of an adequate fee. But however that may be, the measure, though imperfect in operation, as are all systems of taxation and license, is more equitable than a uniform charge for all corporations, which the legislature had the power to impose. And, it may be added, the plaintiff does not suggest a more reasonable substitute.

Because of certain distinct considerations the validity of the tax assailed in the second cause of action is not so free from doubt. To escape the charge that it is an unwarranted burden upon interstate commerce or a tax upon property without the jurisdiction of the state, it should bear some reasonable relation to the extent of the intra- [fol. 49] state business and the value of the right to transact such business; and when available a standard should be adopted in harmony with that idea. These taxes are collected annually and there would seem to be no substantial reason, other than that of convenience, why they should

not be computed on the volume of actual intrastate business for the current year. However, as noted in the opinions of my associates the question in various aspects has frequently been considered by the Supreme Court and we are to find guidance in its decisions. In the analysis of these decisions by Judge Cushman, and in his conclusion I concur with some additional comments. Admittedly under the doctrine of the Baltic Mining Co. case the Washington statute is valid. In the nine cases arising in Massachusetts and decided four years later, reported as International Paper Co. vs. Mass., 246 U. S. 135, Locomobile Co. vs. Mass., 246 U. S. 146, and Cheney Brothers Co. et al. vs. Mass. (7 cases), 246 U. S. 147, clearly the doctrine of the Baltic case is not overruled or qualified but reaffirmed. In the Paper Company and the Locomobile cases the taxes were held invalid for the reason alone that prior to their imposition the State statute had been amended by removing therefrom the maximum limit of the exaction; and in the Cheney case, because the plaintiff was engaged exclusively in interstate business. In the other six cases where the corporations were engaged in both classes of business and the statute had not been amended prior to the imposition of the tax, the court, following the rule of the Baltic case, denied relief. The court regarded the presence or absence of a reasonable maximum or the fact that the corporation was engaged exclusively in interstate business as a controlling consideration. In the Air-Way corporation case (266 U. S. 71) apparently the statute provided no maximum and in other respects was unlike the Washington law. That the rule of the Baltic case was not thought to be involved is to be inferred from the fact that neither party cited it upon any substantive issue and it is not referred to in the opinion. In the Alpha Cement case (268 U. S. 203), after explaining the issue the Court thus stated the question for decision: "May the State impose upon a foreign corporation which transacts only interstate busi- [fol. 50] ness within her borders an excise tax measured by a combination of two factors—the proportion of the total value of capital shares attributed to transactions therein and the proportion of net income attributed to such transactions;" adding that, "Cheney Brothers Co. vs. Massa-

chusetts, 246 U. S. 147, 153, 154, necessitates a negative reply." And in summing up its decision the Court further said: "The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in Cheney Brothers Co. vs. Massachusetts and cannot be enforced against a foreign corporation which does nothing but interstate business within the State." It will thus be seen that the decision was regarded as being strictly within the rule of the Cheney Brothers case, but, as we have seen, that case cannot be deemed out of harmony with the Baltic case for the reason that in the six other cases decided at the same time the Court expressly applied without qualification or limitation, the doctrine of the Baltic case.

I therefore concur in Judge Cushman's general conclusion.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

DISSENTING OPINION—Filed Jan. 9, 1928

BOURQUIN, D. J.:

I dissent. Although the majority makes out a case of reasonableness in respect to the amount of the tax, it is believed the impost contravenes a principle which may be found threading the maze of Supreme Court opinions with a fair degree of consistency, perhaps greater consistency than any other.

Therein, settled and clear principles are few. The court itself has said that they are of "difficult" formulation, and that "every case must be decided upon its own facts,"—a comforting refuge if not alibi in times of legal stress. And that principle is that "a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State."

International etc. Co. v. Mass., 246 U. S. 141;
Union etc. Co. v. Mass., 249 U. S. 282;
Alpha etc. Co. v. Mass., 268 U. S. 218.

In application of said principle, the court has decided that as the property represented by capital stock in excess of that used in the State, is property outside the State, such excess is not taxable by the State.

Airways, etc., v. Day, 266 U. S. 32.

That is the case at bar. The tax is within the ban of the due process clause of the Constitution, and when levied upon a corporation engaged in interstate commerce, within that of the commerce clause as well. Moreover the tax also upon authorized but unissued stock, is unequal and contrary to the Fourteenth Amendment.

[fol. 52] Airways Case, supra.

It is true that in Roberts etc. Co. vs. Emmerson, 271 U. S. 50, it is said that a State may tax a domestic corporation upon its unissued stock. But in that case, the corporation was the creature of the State, all its property was within the State, all its stock was issued, and it was not engaged in interstate commerce,—a radically different case from this at bar, invoking very different principles. Its general expressions, more or less dicta, must be read in the light of its peculiar facts, and not be taken as modifying the Airways Case. It is equally true that in Baltic etc. Co. v. Mass., 231 U. S. 68, a tax on the authorized capital stock of a foreign corporation, far in excess of property within the State, was upheld; for that (1) the tax was subject to a statutory limit of $2,000, (2) the amount was small when contrasted with that in Western etc. Co. v. Kan., 216 U. S. 1, and (3) it was "not void because imposed upon property beyond the State's jurisdiction." At least the second and third of these reasons, however, are overruled in Alpha etc. Co. v. Mass. supra, and the first, if not overruled, has no legitimate justification. It is an excuse rather than a reason.

For in that case as in this at bar, the limit avails nothing to the corporation, is not attained, despite it the tax is as great as if — was no limit, and none the less is a tax upon property beyond the State's confines. And in principle and by implication, the Alpha Case overrules said first reason.

It is noted that considerable water has run under the bridge since the Baltic Case, and the latter is little more than a relic of a period of spirit and tendencies quite dif-

ferent from today's, that spirit and tendencies to which all courts are more or less responsive.

The motion to dismiss ought to be denied, and the injunction granted.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 7, 1928

Now comes the plaintiff in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the order made by this Honorable Court on the 8th day of May, 1928, and the decree of June 7, 1928, amending the same:

I

That the Court erred in denying the petition of the plaintiff for an interlocutory injunction.

II

That the Court erred in sustaining the motion interposed by the defendants to dismiss the bill of complaint in this cause upon the ground that said bill of complaint does not state facts sufficient to entitle the plaintiff to any relief against the above named defendants.

III

That the Court erred in sustaining the motion interposed by the defendants to dismiss the first cause of action set forth in the bill of complaint in this cause upon the ground that the said first cause of action does not state facts sufficient to entitle the plaintiff to any relief against the above named defendants.

[fol. 54] IV

That the Court erred in sustaining the motion interposed by the defendants to dismiss the second cause of action set forth in the bill of complaint in this cause upon the ground that the said second cause of action does not state facts sufficient to entitle the plaintiff to any relief against the above named defendants.

V

That the Court erred in making and entering the decree of May 8th, 1928, and decree of June 7, 1928, amending the same, dismissing the bill of complaint and the cause of action herein and denying petition for interlocutory injunction.

VI

That the Court erred in holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session 1925, do not regulate and burden plaintiff's business of conducting interstate commerce in violation of its right guaranteed to it in Article 1, Section 8, Paragraph 4 of the Constitution of the United States.

VII

That the Court erred in holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session 1925, do not deprive the plaintiff of its property without due process of law and deny to it the equal protection of the law as guaranteed by the 14th Amendment of the Constitution of the United States.

VIII

That the Court erred in holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session 1925, which levy a tax on authorized capital stock of a foreign corporation irrespective of the amount issued are not violative of the equal protection clause of the Federal Constitution, and do not abridge the corporation's privileges and immunities as a citizen.

[fol. 55] IX

That the Court erred in not holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session 1925, are contrary to and in violation of Section 1 of the 14th Amendment and Article 1, Section 8, Paragraph 4 *to* the Constitution of the United States.

Wherefore, in order that the foregoing assignment of errors may be and appear of record, plaintiff presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws and statutes of the United States in such cases made and provided, and plaintiff prays that said decree of May 8th, 1928, and decree of June 7th, 1928, amending the same, be reversed, set aside and held for naught.

E. B. Palmer, Thos. M. Askren, S. W. Brethorst, Thos. Creigh, J. Harry Covington, Solicitors for Plaintiff.

Due, regular and timely service of the foregoing Assignment of Errors is hereby acknowledged this 7 day of June, 1928.

John H. Dunbar, Attorney General. L. B. Donley, Assistant Attorney General.

[File endorsement omitted.]

[fol. 56] In United States District Court

[Title omitted]

Petition for Appeal—Filed June 7, 1928

The above named, The Cudahy Packing Company, feeling itself aggrieved by the decree rendered in the above entitled cause on the 8th day of May, 1928, and decree of June 7, 1928, amending the same, denying to plaintiff an interlocutory injunction and dismissing the bill of complaint and cause of action in said cause, does hereby ap-

peal from said decree to the Supreme Court of the United States and prays that this, its appeal, may be allowed and that a transcript of the records and proceedings in said cause and all things concerning the same on which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herein filed by said The Cudahy Packing Company may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

E. B. Palmer, Thos. M. Askren, S. W. Brethorst, Thos. Creigh, J. Harry Covington, Solicitors for Plaintiff.

Due, regular, and timely service of the foregoing Petition is hereby acknowledged this 7 day of June, 1928.

John H. Dunbar, L. B. Donley, Assistant Attorney General, Solicitors for defendants.

[fol. 57] [File endorsement omitted.]

[fol. 58] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 7, 1928

It is hereby ordered that the appeal prayed for by the above named plaintiff in the above entitled cause to the Supreme Court of the United States be, and the same is hereby, allowed as prayed.

Done in open court this 7th day of June, 1928.

Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division.

Due, regular and timely service of the foregoing Order is hereby acknowledged this 8 day of June, 1928.

John H. Dunbar, Attorney General, L. B. Donley, Assistant Attorney General, Solicitors for defendants.

[File endorsement omitted.]

[fols. 59 & 60] Order fixing amount of bond on appeal, filed June 7, 1928, omitted in printing.

[fols. 61-63] Bond on appeal for $500.00, approved and filed June 7, 1928, omitted in printing.

[fols. 64 & 65] Citation, in usual form. showing service on John H. Dunbar et al., filed June 7, 1928, omitted in printing.

[fol. 66] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed June 7, 1928

To the Clerk of the above-entitled court:

Please make and certify on appeal to the Supreme Court of the United States a record which includes the following files, to wit:

1. Bill of complaint.
2. Subpoena and Marshal's return thereto.
3. Order fixing date of hearing on plaintiff's petition for an interlocutory injunction, and return of service thereon.
4. Motion of defendants to dismiss plaintiff's bill of complaint.
5. Decree of May 8, 1928, and amendatory decree of June 7, 1928, denying interlocutory injunction and dismissing bill of complaint.
6. Opinions of Judges.
7. Assignment of errors.
8. Petition for allowance of appeal.
9. Order allowing appeal.
10. Order fixing amount of bond on appeal.
11. Bond on appeal.
12. Citation.

13. Acceptance of service.

14. This præcipe and acknowledgment of service hereto attached.

E. B. Palmer, Thos. M. Askren, L. W. Brethorst, Thos. Creigh, J. Harry Covington, Solicitors for Plaintiff.

Due, regular and timely service of the foregoing præcipe is hereby acknowledged this 7 day of June, 1928.

John H. Dunbar, Attorney General, L. B. Donley, Assistant Attorney General, Solicitors for Defendants.

[fol. 67] [File endorsement omitted.]

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed July 16, 1928

Comes now the appellant in the above entitled cause and state that the points upon which it intends to rely in this Court in this case are as follows:

Point 1. That the District Court of the United States erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not regulate and burden appellant's business in interstate commerce in violation of Ar-
[fol. 70] ticle 1, Section 8, paragraph 4 of the Constitution of the United States, and that the alleged fees or taxes threatened to be imposed upon appellant by the pretended authority of said statute were not unlawful by virtue thereof.

Point II. That the District Court erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States by imposing a tax upon the property of appellant beyond the jurisdiction of the State of Washington.

Point III. That the District Court erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not deny to appellant the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States by arbitrarily and unreasonably imposing a tax upon the authorized but unissued capital stock of appellant.

Point IV. The District Court erred in denying the petition for an interlocutory injunction and in dismissing the [fol. 71] bill of complaint and in not granting said interlocutory injunction.

And the appellant further states that the whole of the record, as filed, is necessary for the consideration of the case, said record as filed consisting of the following:

Bill of Complaint.
Subpœna and Marshal's return thereto.
Order Fixing date of hearing on plaintiff's petition for an interlocutory injunction, and return of service thereon.
Motion to dismiss plaintiff's bill of complaint.
Decree of May 8, 1928, dismissing bill of complaint.
Opinion of Judges.
Decree of June 7, 1928, amending decree of May 8, 1928, and denying petition for an interlocutory injunction.
Assignment of errors.
Petition for allowance of appeal.
Order allowing appeal.
Order fixing Amount of Bond on Appeal.
Bond for costs on appeal.

[fol. 72] Citation on appeal.
Præcipe.

E. B. Palmer, Thos. M. Askren, S. W. Brethorst, Thos. Creigh, J. Harry Covington, Counsel for Appellant.

Due, regular, and timely service of the foregoing statement of points to be relied upon and designation of the parts of the record to be printed is hereby acknowledged this 10th day of July, 1928.

John H. Dunbar, Attorney General, L. B. Donley, Assistant Attorney General, Counsel for Appellees.

[fols. 73-74] [File endorsement omitted.]

Endorsed on cover: File No. 33,587. D. C. U. S. Western Washington. Term No. 278. The Cudahy Packing Company, a corporation, appellant, vs. Jay Grant Hinkle, Secretary of State, and John H. Dunbar, Attorney General, of the State of Washington. Filed July 16th, 1928. File No. 33,587.

FILE COPY

FILED
NOV 19 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1928

No. 278

THE CUDAHY PACKING COMPANY, A CORPORATION, APPELLANT,

vs.

JAY GRANT HINKLE, SECRETARY OF STATE, AND JOHN H. DUNBAR, ATTORNEY GENERAL OF THE STATE OF WASHINGTON, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

Motion To Advance on Docket

JOHN H. DUNBAR,
Attorney General.

L. B. DONLEY,
Assistant Attorney General
Counsel for Appellees.

E. B. PALMER,
THOS. M. ASKREN,
S. W. BRETHORST,
THOS. CREIGH,
J. HARRY COVINGTON,

Supreme Court of the United States

OCTOBER TERM, 1928

No. 278

THE CUDAHY PACKING COMPANY, A CORPORATION, APPELLANT,

vs.

JAY GRANT HINKLE, SECRETARY OF STATE, AND JOHN H. DUNBAR, ATTORNEY GENERAL OF THE STATE OF WASHINGTON, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

Motion To Advance on Docket

Come now the appeallant and appellees in the above-entitled cause and move that this case be advanced for early hearing, and in support of this motion make the following brief statement of the matter involved and the reasons relied upon for the advancement.

This case comes on appeal from the District Court, with three judges sitting, which denied an injunction restraining certain officials of the State of Washington from enforcing against appellant, a Maine corporation engaged in interstate and intrastate business in Washington and elsewhere, certain provisions of the statutes of the State of Washington relating to the issuance of permits to foreign corporations carrying on business in the State of Washington, and exacting an annual tax therefrom; which statutes in question appellant contends violate Article I, Section 8, Paragraph 4, of the Constitution of the United States, and the due process clause and equal protection clauses of the Fourteenth Amendment thereof. The filing fees required to be paid by a foreign corporation under these statutes before it can do business in the State of Washington, as well as the annual license fees, are based upon the entire authorized capital stock of the foreign corporation, regardless of whether the property represented by the capital stock is employed within or without the State, and are graduated according to the amount of authorized capital stock, regardless of the amount issued.

The Legislature of the State of Washington will convene for its next session in January, 1929, and as it only meets biennially, it will not meet again thereafter until January, 1931. The statutes of the State which

are herein being attacked produce large revenues for the State of Washington, and should these statutes be held unconstitutional by this Honorable Court, then the Legislature at its next session in 1929, which session lasts for a period of sixty days, could enact necessary amendments and the State would not be deprived of all revenues from foreign corporations for a period of two years.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General.

L. B. DONLEY,
Assistant Attorney General
Counsel for Appellees.

E. B. PALMER,
THOS. M. ASKREN,
S. W. BRETHORST,
THOS. CREIGH,
J. HARRY COVINGTON,
Counsel for Appellant.

FILE COPY

AUG 10 1928

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 278.

THE CUDAHY PACKING COMPANY, *Appellant*,

vs.

JAY GRANT HINKLE, Secretary of State, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

STATEMENT AS TO JURISDICTION ON APPEAL.

E. B. PALMER,
THOS. M. ASKREN,
S. W. BRETHORST,
THOS. CREIGH,
J. HARRY COVINGTON,
Counsel for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 278.

THE CUDAHY PACKING COMPANY, *Appellant*,

vs.

JAY GRANT HINKLE, Secretary of State, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

STATEMENT AS TO JURISDICTION ON APPEAL.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A. Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, 938, (United States Code, Title 28, Section 345), provides that Section 238 of the Judicial Code is amended to read in part as follows:

> "Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> * * * * * * * * *
>
> "(3) An Act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a State or of an order made by an administrative board or commission created by and acting under the statute of a State, approved March 4, 1913, which Act is hereby amended by adding at the end thereof, 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.' "

B. Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on May 8, 1928, (R. 27)* and amended by decree entered June 7, 1928, (R. 29).

The Application for Appeal was presented on June 7, 1928, (R. 56).

---

*All references to the record are to the pages of the typewritten record as prepared by the clerk of the District Court. The record has not yet been printed.

C. The Nature of the Case.

Appellant brought a bill for an injunction in the District Court of the United States for the Western District of Washington to restrain the Secretary of State and the Attorney General of the State of Washington from enforcing against appellant, a corporation engaged in interstate and intrastate business in Washington, and elsewhere, and its agents certain provisions of the statutes of the State of Washington relating to the issuance of permits to foreign corporations carrying on business in the State of Washington and exacting an annual tax therefrom on the ground that the statutes in question violate Article 1, Section 8, paragraph 4, of the Constitution of the United States and the due process and equal protection clauses of the Fourteenth Amendment thereof.

As required by Section 266 of the Judicial Code, District Judge Cushman called to his assistance to hear and determine the application for an interlocutory injunction Circuit Judge Dietrich and District Judge Bourquin. (R. 22.) The application and defendants' motion to dismiss the bill of complaint (R. 26) were heard by the three judges on September 22, 1927. The statutory court thus created, with Judge Bourquin dissenting (R. 51), denied the application for the interlocutory injunction (R. 29), and dismissed the Bill of Complaint. (R. 27.)

Application for appeal from both decrees was presented on June 7, 1928 (R. 56) and allowed June 7, 1928. (R. 58.)

Sections 3855 and 3861 of Remington's Compiled Statutes of Washington provide penalties and punishments for any foreign corporation or its agents doing business in Washington which has failed to pay cer-

tain filing fees and annual license taxes. These fees are by Sections 1 and 2, Chapter 149, Extraordinary Session Laws of 1925, based upon the entire authorized capital stock of the foreign corporation, and are gradated according to the amount of authorized capital stock regardless of amount issued.

Section 3 of said Chapter 149, Extraordinary Session 1925, imposes an annual license tax also based upon the entire authorized capital stock of such corporations.

Appellant's authorized capital stock is $45,000,000, of which only $29,800,000 is issued and outstanding, and all of appellant's property does not exceed in value the amount of its issued capital stock. Only $40,000 of the issued capital stock represents appellant's property located or employed in Washington. Less than six-tenths of one per cent of the entire business of The Cudahy Packing Company is done in the State of Washington and more than one-half of the business done in the State of Washington is interstate and foreign commerce.

The filing fee imposed upon appellant by Sections 1 and 2 of Chapter 149 amounts to $1,180. And the so-called annual franchise tax imposed by Section 3 amounts to a further sum of $580.00.

Petitioner is engaged in the business of preparing meats and foodstuffs at its several packing plants and selling the same in interstate commerce in all the forty-eight States and in almost all foreign countries. About 1890, appellant first began doing business in the State of Washington. Appellant established an agency at Seattle and the business transacted in Washington was, and continuously since has been, the importation into Washington and the sale there, or the importation and delivery there after sale elsewhere, of its goods, and

such other transactions as are incidental to its interstate business and so closely related thereto that they, neither in whole nor in part, can be separated from its interstate commerce business without burdening such commerce and rendering its conduct more expensive and less convenient.

D. Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Clark v. Poor, 274, U. S. 554;
Smith v. Wilson, 273 U. S. 388, 391;
Moore v. Fidelity & Deposit Co., 272 U. S. 317, 320;
Ex parte Buder, 271 U. S. 461, 464-465;
Pacific Telephone & Telegraph Co. v. Kuykendall, 265 U. S. 196, 206;
Shaffer v. Carter, 252 U. S. 37, 44.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

E. B. Palmer,
Thos. M. Askren,
S. W. Brethorst,
Thos. Creigh,
J. Harry Covington,
Counsel for Appellant.

FILE COPY

FILED
DEC 10
CHARLES ELMORE

No. 278

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

28

THE CUDAHY PACKING COMPANY, A CORPORATION,
Appellant,

v.

JAY GRANT HINKLE, Secretary of State, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees.*

Appeal From the District Court of the United States for the Western District of Washington.

BRIEF FOR APPELLANT.

E. B. PALMER,
THOS. M. ASKREN,
S. W. BRETHORST,
THOS. CREIGH,
J. HARRY COVINGTON,
Solicitors for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
REPORT OF OPINIONS BELOW	1
STATEMENT OF THE CASE	2
ASSIGNMENT OF ERRORS	7
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. Chapter 149, Laws of Washington, Extraordinary Session 1925, is in Legal Effect a Tax upon all of the Property Represented by the Capital Stock of the Appellant, Therefore a Tax upon such Parts of the Property as are Engaged in Interstate Commerce, and an Invalid Tax under the Commerce Clause of the Constitution of the United States, Section 8, Article I	9
1. The Principles Applicable to This Case are Clear and Have Been Repeatedly Enunciated by This Court. The Statutes in Question Patently Violate These Principles	9
2. The Baltic Mining Co. Case Has Not Only Been Disapproved by This Court, But is Inapplicable to the Facts of This Case	13
3. State Courts Applying Decisions of This Court Have Uniformly Held Similar Statutes Unconstitutional	19
II. Chapter 149, Laws of Washington, Extraordinary Session 1925, Operates to Tax the Property of the Appellant Beyond the Territorial Jurisdiction of the State, which is not Amenable to its Revenue Laws and is Therefore Confiscatory in Nature and Deprives Appellant of its Property without Due Process of Law, in Violation of the Fourteenth Amendment to the Constitution of the United States	22

Page

III. Chapter 149, Laws of Washington, Extraordinary Session 1925, Operates to Tax the Authorized Capital Stock of Appellant, Irrespective of the Amount Issued, which is Arbitrary and has no Reasonable Relation to the Value of the Privilege Exercised in Washington, and is Therefore Violative of the Equal Protection Clause and Abridges the Corporation's Privileges and Immunities as a Citizen in Violation of the Fourteenth Amendment to the Constitution.... 23

CONCLUSION 26

APPENDIX 29

Sections 1 and 2, Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925 29

Section 1, amending Section 3836 of Remington's Compiled Statutes 29

Section 2, amending Section 3837 of Remington's Compiled Statutes 30

Section 3, Chapter 149, Laws of the State of Washington, Extraordinary Session 1925, amending Section 3841 of Remington's Compiled Statutes 30

Section 3842 of Remington's Compiled Statutes of Washington 1922 31

Section 3843 of Remington's Compiled Statutes of Washington 1927 32

Section 3844 of Remington's Compiled Statutes of Washington 1927 33

Section 3846 of Remington's Compiled Statutes of Washington 1922 33

Section 3853 of Remington's Compiled Statutes of Washington 1927 34

Section 3854 of Remington's Compiled Statutes of Washington 1922 35

Section 3855 of Remington's Compiled Statutes of Washington 1922 36

Page

Section 3861 of Remington's Compiled Statutes of Washington 1922 37

CASES CITED.

Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71 .....11, 14, 19, 24
Alpha Portland Cement Co. v. Mass., 268 U. S. 203 8, 11, 13, 14, 15, 19, 22
Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U. S. 280 .....11, 22
Badger v. Crockett, 259 Pac. (Utah) 921 .....19, 22
Baltic Mining Co. v. Mass., 231 U. S. 68 8, 13, 14, 19, 20, 26
Buck Stove & Range Co. v. Vickers, 226 U. S. 205 11
Case Threshing Machine Co. v. Stewart, 60 Mont. 380 .....19, 22
Cheney Bros. Co. v. Mass., 246 U. S. 147 11
Cudahy Packing Co. v. Hinkle, 24 Fed. (2d) 124 1
Foster-Fountain Packing Co. v. Haydel, Advance Opinions, 73 L. ed. 1 12
General Electric Co. v. Stewart, 60 Mont. 387 22
General Ry. Signal Co. v. Virginia, 246 U .S. 500 14, 17, 18
Great Northern Ry. Co. v. Washington, 147 Wash. 630 .....20, 21
Hanover Fire Ins. Co. v. Harding, 272 U. S. 494 .. 11
Hirschfeld v. McCullagh, 64 Ore. 502 19
International Paper Co. v. Mass., 246 U. S. 135 11, 14, 19, 22, 27
International Textbook Co. v. Pigg, 217 U. S. 91 11, 22
Kansas City, Fort Scott & M. Ry. Co. v. Botkin, 240 U. S. 227 .....14, 17, 18
Kansas City, Memphis & B. Ry. Co. v. Stiles, 242 U. S. 111 .....14, 17, 18
Looney v. Crane Co., 245 U. S. 178 .....11, 13, 14, 22
Ludwig v. Western Union Tel. Co., 216 U. S. 146 11, 22
Lusk v. Botkin, 240 U. S. 236 .....14, 17
Minneapolis Steel & Machinery Co. v. Crockett, 263 Pac. (Utah) 926.....19, 25

Page

O'Gara Coal Co. v. Emmerson, 326 Ill. 18 .....19, 25
Perkins Manufacturing Co. v. Jordan, 200 Cal. 667 .....19, 20, 22, 25
Pick & Co. v. Jordan, 169 Cal. 1 20
Postal Telegraph Cable Co. v. Adams, 155 U. S. 688 .....11, 17
Pullman Co. v. Kansas, 216 U. S. 56 .....11, 13, 22
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50 24, 25
Sioux Remedy Co. v. Cope, 235 U. S. 197 11
Southern Ry. Co. v. Greene, 216 U. S. 400 11
Southern Ry. Co. v. Kentucky, 274 U. S. 76 11
Sprout v. South Bend, 277 U. S. 163 11
St. Louis, Southwestern Ry. Co. v. Arkansas, 235 U. S. 350 .....14, 17
Union Tank Line Co. v. Wright, 249 U. S. 275 11
Western Union Tel. Co. v. Kansas, 216 U. S. 1 11, 13, 15, 19, 20, 21, 22, 27

STATUTES CITED.

Constitution of the United States,
Article I, Section 8 8
Article I, Section 8, Paragraph 4 7
Fourteenth Amendment to 7, 8, 9
Judicial Code, Section 266 2
Remington's Compiled Statutes of Washington, 1925,
Section 3842 ..... 5, 6
Section 3846 5
Section 3853 3
Section 3855 4
Section 3861 4
Session Laws of Washington, Extraordinary Session of 1925,
Chapter 147 3
Chapter 149, Section 1 .....4, 7, 8, 9
Chapter 149, Section 2 .....4, 7, 8, 9
Chapter 149, Section 3 .....4, 7, 8, 9

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1928.

The Cudahy Packing Company, a Corporation,
Appellant,

v.

Jay Grant Hinkle, Secretary of State, and John H. Dunbar, Attorney General of the State of Washington, *Appellees.*

Appeal From the District Court of the United States for the Western District of Washington.

BRIEF FOR APPELLANT.

REPORT OF OPINIONS BELOW.

The opinions of the statutory court (R. 24-44) are reported in 24 Fed. Rep. (2nd) p. 124.

STATEMENT OF THE CASE.

This is an appeal from a decree made on May 8th, 1928, as amended by a decree of June 7th, 1928, by Honorable Frank S. Dietrich, Circuit Judge, and Hon-

orable Edward E. Cushman and Honorable George M. Bourquin, District Judges, sitting as a statutory court under Section 266 of the Judicial Code, which decree denied an application of The Cudahy Packing Company, appellant here, for an interlocutory injunction restraining the Secretary of State and the Attorney General of the State of Washington from enforcing against appellant the provisions of the Washington statutes with reference to the issuance of permits to foreign corporations transacting business therein and exacting an annual tax therefrom, for the reason that the statutes are violative of the Federal Constitution.

The substantial and material facts are as follows:

The appellant, The Cudahy Packing Company, is incorporated under the laws of Maine, is the successor of a corporation of the same name organized under the laws of Illinois, and is engaged in the business of preparing meats and foodstuffs at its several packing plants and selling the same in interstate commerce in all the forty-eight states and in almost all foreign countries. (R. 1, 2, 3 and 5.)

In the year 1890 appellant's predecessor first entered and began doing business in the State of Washington. Appellant qualified to do business in Washington in January, 1916, but it does not now, nor has it ever, maintained a slaughter house or packing plant in the State of Washington, its only agency in Washington being a warehouse and sales office which is located in Seattle. Since establishing an agency in Washington, the business transacted has been the importation into Washington and the sale there, or the importation and delivery there after sale elsewhere, of its goods, and such other transactions as are incidental to its interstate business and so closely related thereto as that

they, either in whole or in part, cannot be separated from the interstate commerce business of the appellant without burdening such commerce and rendering the conduct thereof more expensive and less convenient. (R. 3, 4, 5 and 25.)

Appellant's authorized capital is $45,000,000.00, but of this authorized capital only $29,800,000.00 has been issued, and all of its property, wherever situated, does not exceed in value the amount of its issued capital stock. Of the capital stock issued, only $40,000.00 represents the assets and property of appellant located or in any way used in Washington. Of all of its business during the past year appellant only transacted 6/1000 in the State of Washington, and of this less than half was intrastate business. The stock of goods carried in its Seattle warehouse consists, in the most part, of original packages, and more than half of such goods are shipped out to purchasers in unbroken packages. (R. 4, 5, 8, and 25.)

Appellant qualified to do business in Washington in 1916 by filing its articles of incorporation and paying a filing fee of $25 as required by law. (R. 5, 8.) Its capital stock was then $20,000,000. (R. 5.) In 1919 appellant's authorized capital stock was increased to $35,000,000. Although no law of Washington at that time required the filing of a certificate of increase of capital stock, appellant did file such a certificate and paid a fee of $10. (R. 5, 8.) Subsequent to 1919 appellant's authorized capital stock was increased to $45,000,000. No certificate of this increase has been filed. (R. 5.)

In 1925, by Chapter 147, Section 1, Extraordinary Session of 1925, Section 3853 of Remington's Compiled Statutes of Washington was amended to require every foreign corporation desiring to do business in Wash-

ington to file with the Secretary of State certificates of increase of capital stock. (See page 34, *infra.*)

At the same session of the legislature by Sections 1 and 2 of Chapter 149, fees were provided for filing articles of incorporation or amendments thereto increasing capital stock. These fees were based upon the authorized capital stock and for corporations having an authorized capital stock of $45,000,000 required a payment of $1180,—$750 for the first $1,000,000, and $10 for each $1,000,000 or fraction thereof in excess of $2,000,000. When amendments increasing capital stock were filed the tax was to be computed upon the total authorized capital stock and credits allowed for amounts previously paid as filing fees. A maximum tax of $3,000 was provided for. (See pages 29, 30, *infra.*)

By Section 3 of the same Chapter, an annual license tax was imposed also based upon authorized capital stock. As applied to a corporation having an authorized capital stock of $45,000,000, the annual license tax so imposed was $580. A maximum tax of $3,000 was also provided for. (See pages 30, 31, *infra.*)

The penalties incurred for failure to pay the filing fees provided for above are as follows:

Section 3855, Rem. Compl. Stats.: Penalty of $250.

Section 3861, Rem. Compl. Stats.: Any agent of any foreign corporation carrying on business without filing the documents referred to may be fined $200 or imprisoned for three months or both.

The penalties incurred for failure to pay the annual license tax are as follows:

Section 3842, Rem. Compl. Stats.: No corporation can commence or maintain any action in court.

Failure to pay tax is prima facie evidence of insolvency.

Name stricken from list for failure to pay for two years and any other corporation may take name.

State may sue for tax.

Section 3846, Rem. Compl. Stats.: If all license taxes and penalties are not paid within three years the corporation is dissolved and property is disposed of by court proceedings to creditors and stockholders.

These statutes are printed on pages 31 to 37, *infra*.

In 1926 appellant tendered the Secretary of State, for filing, its certificate of increase of capital stock together with a filing fee of $10. The Secretary of State refused to file the certificate or to accept the fee and demanded as a condition precedent to filing it a fee of $545.* (R. 8.)

In 1927 appellant tendered the Secretary of State and the State Treasurer $15.00—the annual license tax imposed by Chapter 140 of the Laws of 1907—and demanded a license to do business in the State of Washington. But these officers, acting under the statutes referred to above, refused such license unless and until appellant paid for filing its certificate of increase of capital stock a fee of $545 and the annual license fee of $580. (R. 14-15.)

Upon the refusal of appellant to pay the annual li-

*The amount demanded was due to an error in calculation. The correct fee under the statute was $1180 less $35 previously paid, or $1145,

cense fee the officers mentioned informed appellant that unless the fees were paid, the Secretary of State would refuse to issue to the appellant any license permitting it to do business in the State of Washington for the year commencing July 1st, 1927, and subsequent years, and would in accordance with the laws above mentioned strike appellant's name from the records of his office and enter thereon a notation of the appellant's dissolution as a corporation; that appellant would be deprived on and after the 1st day of July, 1927, of the right to commerce or maintain any action, suit or proceeding in any court of the State of Washington, would be under a presumption of insolvency and under a constant threat and danger of receivership and in danger of the loss of its name to some other corporation thereafter organized. The officers have notified the State Board of Tax Commissioners under the authority of the Section 3842, of the delinquency of appellant, and the Board through the Attorney General is threatening suit to enforce the payment of such license fee. The Secretary of State has informed appellant that he is about to forfeit, on the books of his office, the right of appellant to do business in the State, and to advise appellant's debtors and those having claims against it of that fact, and is about to issue a certificate to that effect to such persons. The Attorney General is threatening to institute suits against appellant for penalties for non-payment of its license tax,—to oust it from doing business in the State of Washington, and commence actions against all of appellant's agents in the State. (R. 9, 10, 15, 16, 17.)

These threats, if carried out, will deprive appellant of its right to do interstate business and business incidental thereto in the State of Washington, and cause appellant irreparable injury.

The appellant thereupon applied to the United States District Court for an injunction praying for an interlocutory injunction. The defendants moved to dismiss the bill. The interlocutory injunction was denied and the bill dismissed as set forth above. Each member of the statutory court filed an opinion. Judge Bourquin dissented. (R. 24, 38, and 42.)

ASSIGNMENT OF ERRORS.

I.

The District Court of the United States erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not regulate and burden appellant's business in interstate commerce, in violation of Article I, Section 8, Paragraph 4 of the Constitution of the United States, and that the alleged fees or taxes threatened to be imposed upon appellant by the pretended authority of said statute were not unlawful by virtue thereof.

II.

The District Court erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, by imposing a tax upon the property of appellant beyond the jurisdiction of the State of Washington.

III.

The District Court erred in finding and holding that Sections 1, 2 and 3 of Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, did not deny to appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, by arbitrarily and unreasonably imposing a tax upon the authorized but unissued capital stock of appellant.

IV.

The District Court erred in denying the petition of appellant for an interlocutory injunction, and in dismissing the bill of complaint and in not granting said interlocutory injunction.

SUMMARY OF ARGUMENT.

I. Chapter 149, Laws of Washington, Extraordinary Session 1925, is in legal effect a tax upon all of the property represented by the capital stock of the appellant, therefore a tax upon such parts of the property as are engaged in interstate commerce, and an invalid tax under the commerce clause of the Constitution of the United States, Section 8, Article I.

It is apparent that the statutory court thought that the case of *Baltic Mining Co. v. Mass.*, 231 U. S. 68, was controlling in the instant case. The *Baltic* case, however, was not only based on facts entirely dissimilar to the facts in the case at bar, but has been restricted and disapproved if not overruled by this Court in *Alpha Portland Cement Company v. Mass.*, 268 U. S. 203, and other cases which furnish the controlling authorities here.

II. Chapter 149, Laws of Washington, Extraordinary Session 1925, operates to tax the property of the appellant beyond the territorial jurisdiction of the State, which is not amenable to its revenue laws and is therefore confiscatory in nature and deprives appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

III. Chapter 149, Laws of Washington, Extraordinary Session 1925, operates to tax the authorized capital stock of appellant, irrespective of the amount issued, which is arbitrary and has no reasonable relation to the value of the privilege exercised in Washington, and is therefore violative of the equal protection clause and abridges the corporation's privileges and immunities as a citizen in violation of the Fourteenth Amendment to the Constitution.

I.

Chapter 149, Laws of Washington, Extraordinary Session of 1925, is in Legal Effect a Tax Upon All of the Property Represented by the Capital Stock of the Appellant, Therefore a Tax Upon Such Parts of the Property as Are Engaged in Interstate Commerce, and an Invalid Tax Under the Commerce Clause of the Constitution of the United States, Section 8, Article I.

1. *The Principles Applicable to this Case are Clear And Have Been Repeatedly Enunciated by this Court. The Statutes In Question Patently Violate These Principles.*

This Court has laid down the following principles which govern the validity of license taxes imposed by

states on foreign corporations as a condition of permission to do business within the state:

> The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the state is taxed; but the amount must be made dependent on the value of the property situated within the state, and no excise will be supported which is laid upon a foreign corporation on account of interstate business.
>
> A state cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the state, and it cannot require the corporation, as a condition of the right to do a local business therein, to submit to a tax on its interstate business or on its property outside the state, for this is prohibited by the Fourteenth Amendment to the Constitution of the United States.
>
> A state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business.
>
> A license fee of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, is a tax on the entire business of the corporation and on its entire property, including that in other states, for the capital stock of a corporation represents all its business of every class and all its property wherever located.
>
> The amount of the tax demanded is unimportant when there is no legitimate basis for it.
>
> The mere number of authorized shares of capital stock is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of annual license fees, for such a classification is not based on anything having relation to the purpose for which it is made and does not produce equity.

A tax levied by a state on the business of a foreign corporation is a burden upon interstate commerce if there is such connection between interstate and local business that discontinuance of the local business would seriously impair the interstate business on account of economy of operation.

Interstate business is unduly burdened if a foreign corporation has acquired permanent property in the state before the imposition of the license tax, especially adapted to carrying on both classes of business and not interstate commerce alone.

Postal Telegraph Cable Co. v. Adams, 155 U. S. 688;
Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Pullman Co. v. Kansas, 216 U. S. 56;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
Southern Ry. Co. v. Greene, 216 U. S. 400;
International Text Book Co. v. Pigg, 217 U. S. 91;
Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U. S. 280;
Buck Stove & Range Co. v. Vickers, 226 U. S. 205;
Sioux Remedy Co. v. Cope, 235 U. S. 197;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Cheney Bros. Co. v. Mass., 246 U. S. 147;
Union Tank Line Co. v. Wright, 249 U. S. 275;
Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71;
Alpha Portland Cement Co. v. Mass., 268 U. S. 203;
Hanover Fire Ins. Co. v. Harding, 272 U. S. 494;
Southern Ry. Co. v. Kentucky, 274 U. S. 76;
Sprout v. South Bend, 277 U. S. 163.

Foster-Fountain Packing Co. v. Haydel, Decided Oct. 15, 1928, Advance Opinions, 73 L. ed. 1.

The system of taxation attacked in the foregoing cases is precisely the same as that in the Washington statute now before this Court for consideration; that is to say, fixed amounts are payable, graduated according to the amount of the authorized capital stock. They differ from the Washington statute in that the Washington statute fixes a limitation or maximum fee while those statutes have no such limitation.

The facts of the instant case bring it within the principles laid down in the preceding cases.

The appellant's predecessor came into Washington, filed its articles of incorporation and began doing interstate and intrastate business in the year 1890, at which time no tax or fee was imposed. The statute in question was not enacted until 1925, and at that time appellant had already acquired permanent property adapted to carrying on both an interstate and intrastate business, and was carrying on, as it now is, an inconsiderable local business—less than 3/1000 of its total business—as incidental to, and in aid of, its interstate business, from which it is inseparable without serious impairment of the interstate business.

Appellant's authorized capital is $45,000,000.00, but of this only $29,800,000.00 has been issued; and of its capital stock issued, only $40,000.00 represents its assets and property located or in any way used in Washington, and therefore the State of Washington is taxing the appellant on $29,760,000.00 of its property located in other states, as well as on $15,200,000.00 of capital stock which represents no property whatsoever.

The statute in the case of *Looney v. Crane Co.*, 245 U. S. 178, is almost identical with the Washington statute in the instant case, for it required both the payment of a filing fee and annual license fee. This Court in that case for the first time passed upon the validity of an annual franchise tax and held it void, not only because of the dependence of the two provisions (the filing fee and annual franchise tax), but because, considered alone, it was objectionable as a burden upon interstate commerce.

The facts in the instant case make the Washington statute more objectionable than the Texas statute as applied in the *Crane* case. The intrastate business of the Crane Company far exceeded that of the appellant, its intrastate business having been 1/39 of all its business, while the intrastate business of appellant is less than 3/1000 of all of its business. The assets of the Crane Company far exceeded its capital stock, all of which was issued, while the assets of the appellant do not exceed the amount of its issued capital stock, which is less than two-thirds of its authorized capital stock. Thus the facts of the instant case clearly bring it within the decision of the *Crane* case, and the Washington statute should therefore be held void.

2. *The Baltic Mining Co. Case Has Not Only Been Disapproved By This Court, But is Inapplicable to the Facts of This Case.*

Subsequent to the decisions of this Court in the *Western Union Tel. Co. v. Kansas, supra,* and *Pullman Co. v. Kansas, supra,* and prior to the decisions in the *Looney v. Crane Co.*, and *Alpha Portland Cement Co. v. Massachusetts, supra,* the case of *Baltic Mining Co. v. Mass.*, 231 U. S. 68, and several companion cases

were decided by this Court, in which statutes which levied a graduated fee or tax according to the amount of the authorized capital stock of the foreign corporation, but with a limited or maximum fee, were held valid.

Baltic Mining Co. v. Mass., 231 U. S. 68;
St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350;
Kansas City, Fort Scott & M. Ry. Co. v. Botkin, 240 U. S. 227;
Lusk v. Botkin, 240 U. S. 236;
Kansas City, Memphis & B. Ry. Co. v. Stiles, 242 U. S. 111;
General Ry. Signal Co. v. Virginia, 246 U. S. 500.

It is apparent from the decisions of the statutory court in the instant case that the majority of the court considered the *Baltic* case and its companion cases controlling of the case at bar, and expressed the opinion that the *Baltic* case was not overruled by the case of *Alpha Portland Cement Co. v. Mass., supra,* although it had been criticized and restricted by this Court in *Looney v. Crane Co., supra; International Paper Co. v. Mass., supra,* and *Air-Way Electric Appliance Corp. v. Day, supra,* and finally, by unanimous decision of this Court, was expressly overruled, the Court in its opinion, *Alpha Portland Cement Co. v. Mass., supra,* at page 218, stating:

> "It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clauses; and the Fourteenth Amendment

> does not permit taxation of property beyond the state's jurisdiction. *The amount demanded is unimportant* when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co. v. Mass.*, 231 U. S. 68; 58 L. ed. 127; 34 Sup. Ct. Rep. 15; tends to support a different view, *it conflicts with conclusions reached in later opinions and is now definitely disapproved.*" (Italics ours.)

The statement of the court to the effect that one of the considerations upon which the tax can be upheld is that, where a maximum fixed by law does not itself appear to be unreasonable in amount, it will be upheld, ignores the clear holding of this Court in the *Alpha Portland Cement* case that "*the amount demanded is unimportant where there is no legitimate basis for the tax.*"

The Baltic Mining Co. was a Delaware corporation, and, as this Court said, "*was not engaged in interstate commerce in Massachusetts.*" It maintained its office in Boston for the use of its officers and for the general financial management and direction of its affairs, for the meeting of its board of directors and for the transfer of its stock. What business it transacted was *purely local,* and its assets amounted to more than four times its capital stock. This Court stated that it was not intended in any way to limit the cases of *Western Union Tel. Co. v. Kansas, supra,* and other cases cited above, and further stated that each case must be considered on its own facts.

The *Cudahy* case is so dissimilar to the *Baltic* case, except that there is a similar limitation on the amount of the fee, that it should not be considered as governed by it. The appellant carries on an extensive interstate commerce in the State of Washington, while its local

business is inconsiderable, although in aid of its interstate business, from which it is inseparable without serious impairment of the interstate business. In the *Baltic* case Justic Day said that the Supreme Judicial Court of Massachusetts held that the Massachusetts statute therein considered "did not apply to corporations whose business is interstate commerce, or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation."

It is very evident that the court, speaking through Justice Day, did not intend to sustain such a tax applied to one in the position of the appellant in the instant case.

The Court, however, in its opinion upheld the Massachusetts statute, which levied a tax on the authorized capital stock of foreign corporations far in excess of property within the state, on the three following grounds:

1. The tax was subject to a statutory limitation of $2,000.00.
2. The amount was small when contrasted with that in the case of *Western Union Tel. Co. v. Kansas,* 216 U. S. 1.
3. The tax was not void because imposed upon property beyond the state's jurisdiction.

We submit that Judge Bourquin, in his lucid dissenting opinion, was correct when he stated:

> "At least the second and third of these reasons, however, are overruled in *Alpha Portland Cement Co. v. Mass., supra,* and the first, if not overruled,

has no legitimate justification. It is an excuse rather than a reason.

"For in that case, as in this at bar, the limitation avails nothing to the corporation if not attained. Despite it the tax is as great as if there was no limit, and none the less is a tax upon property beyond the state's confines. And in principle and by implication, the *Alpha* case overrules said first reason."

The *Arkansas, Botkin, Stiles,* and *General Railway Signal* cases, companion cases of the *Baltic* case heretofore referred to, were relied upon also by the Attorney General in the lower court as sustaining the validity of the tax or fee imposed on corporations in proportion to their authorized capital stock, whether the property represented by the stock is situated in the state or not. But these cases, we respectfully submit, do not so hold.

The tax in *St. Louis Southwestern Ry. Co. v. Arkansas,* 235 U. S. 350, was sustained by this Court because it was fixed at a percentage of the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in the state. This Court held that the franchise intended to be taxed was that which related solely to intrastate business. A special emphasis was laid upon the principle announced in the case of *Postal Telegraph Cable Co. v. Adams,* 155 U. S. 688, that property in a state may be taxed "if the ascertainment of the amount is made dependent in fact on the value of its property within the state, * * * and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

But under the Washington statute appellant is abso-

lutely required to pay a tax on all its property in the forty-eight states and in many foreign countries, for the tax is not dependent on the value of appellant's property in Washington, but on all its property and assets everywhere.

The case of *Kansas City, Fort Scott & M. Ry. Co. v. Botkin,* 240 U. S. 227, involved a tax on a domestic corporation, and was held to be a tax on the privilege of being a corporation in the state of its origin. The succeeding case of *Lusk v. Botkin,* 240 U. S. 236, involved a tax only on the proportion of the issued capital stock represented by its property and business in Kansas.

In the case of *Kansas City, Memphis & B. Ry. Co. v. Stiles,* 242 U. S. 111, a franchise tax was levied on a corporation which had consented to be subject to the same laws as a domestic corporation, it having become a consolidated company under the laws of the state.

In *General Ry. Signal Co. v. Virginia,* 246 U. S. 500, a Virginia law imposed a fee on foreign corporations for the privilege of doing a local business. The prescribed fees did not vary in direct proportion to the capital stock, and a maximum was fixed. In sustaining a maximum fee of $5,000.00, this Court said that the case was on the border line.

None of these cases are authority for sustaining a tax on a foreign corporation engaged in interstate commerce, which tax is imposed in proportion to the authorized capital stock of the corporation representing all its property and business, a relatively small proportion of which is within the state of taxation. This Court also commented that the domestic business of the companies involved was quite separate from their interstate business, as is not the case with appellant, *which uses the same instrumentalities and agencies*

for carrying on both intrastate and interstate commerce.

Even in the cases cited to support its validity, the distinctions made by the Justices rendering the opinions necessarily imply the invalidity of the tax here in question.

3. *State Courts Applying Decisions of This Court Have Uniformly Held Similar Statutes Unconstitutional.*

The validity of statutes almost identical to that of the Washington statute, Chapter 149, Extraordinary Session, Laws of 1925, has been before the courts of five states and they were all uniform in holding that the decisions of the United States Supreme Court in *Alpha Portland Cement Co. v. Mass.*, 268 U. S. 203, *International Paper Co. v. Mass.*, 246 U. S. 135, and *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71, realigned that Court in accord with such previous decisions as *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, and companion cases, and distinguished and definitely overruled *Baltic Mining Co. v. Mass.*, 231 U. S. 68.

Perkins Manufacturing Co. v. Jordan, 200 Cal. 667;
Badger v. Crockett, 259 Pac. (Utah) 921;
The O'Gara Coal Co. v. Emmerson, 326 Ill. 18;
Hirschfeld v. McCullagh, 64 Ore. 502;
J. I. Case Threshing Machine Co. v. Stewart, 60 Mont. 380;
Minneapolis Steel & Machinery Co. v. Crockett, 263 Pac. (Utah) 926.

In all of these cases but the Montana case, a maximum fee was fixed by the statutes, but the courts held

that this would not save them, for the amount demanded is unimportant when there is no legitimate basis for the tax. The California case of *Perkins Manufacturing Co. v. Jordan,* 200 Cal. 667, is of peculiar interest, for the court overthrew its holding in the case of *Pick v. Jordan,* 169 Cal. 1, which case had held a similar statute of California unconstitutional because of the court's desire to follow the United States Supreme Court in *Baltic Mining Co. v. Mass.,* 231 U. S. 68, which it at that time had considered indistinguishable from the cases of *Western Union Tel. Co. v. Kansas, supra,* and others cited on page 11.

The validity of the Washington statute, Chapter 149, Extraordinary Session, Laws of 1925, was recently considered by the Supreme Court of Washington in the case of *Great Northern Ry. Co. v. Washington,* 147 Wash. 630, in which case the court held the statute invalid and void as to railway companies doing both a local and interstate commerce. The court did not find it necessary to rest its decision on the overruling of the *Baltic* case, and stated that it was undetermined as to whether it had been fully disapproved by this Court. The reasons given for the decision were that a public carrier was not free to withdraw from business in the state, and that the statute violated the due process clause of the Fourteenth Amendment to the Federal Constitution because of imposing a tax on property beyond the jurisdiction of the state.

It is submitted that the first reason given applies equally to appellant, for it is no more free to withdraw from the State of Washington than is a public carrier. It is true that appellant has not invested in property in this State such a large percentage of its capital stock as has the Great Northern Railway Com-

pany, but yet it has a large and substantial investment, and in the past year has done a business of a half million dollars in the State. The Great Northern Railway Company also has ten times the issued capital stock of appellant, while its property in Washington, it is true, is a hundred times the value of appellant's. To compel appellant to withdraw from Washington is a violation of the commerce clause of the Constitution just as much as to compel the Great Northern Railway Company to withdraw. The amount involved is unimportant where there is a clear violation of the Constitution, for one's rights, even though small, are sacred and will be fully protected. The violation of one's constitutional rights, regardless of the extent, will not be countenanced. If appellant refuses to assume the unconstitutional burden, then its local business must cease, and hence the property established for the purpose of doing its local business will be confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place. *Western Union Tel. Co. v. Kansas,* 216 U. S. 1.

It is further submitted that the last reason given by the court in the *Great Northern* case must be considered as invalidating the statute as to all foreign corporations carrying on local and interstate commerce which have assets or property in other states, whether they be public carriers or not.

II.

Chapter 149, Laws of Washington, Extraordinary Session 1925, Operates to Tax the Property of the Appellant Beyond the Territorial Jurisdiction of the State, Which is Not Amenable to Its Revenue Laws and is Therefore Confiscatory in Nature and Deprives Appellant of Its Property Without Due Process of Law, in Violation of the Fourteenth Amendment to the Constitution of the United States.

State statutes imposing a tax on the authorized capital stock of a foreign corporation exert a taxing authority of the state over property and rights wholly beyond its confines and not subject to its jurisdiction, and therefore constitute a taking without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Pullman Co. v. Kansas, 216 U. S. 56;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
International Text Book Co. v. Pigg, 217 U. S. 91;
Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U. S. 280;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Alpha Portland Cement Co. v. Mass., 268 U. S. 203;
J. I. Case Threshing Machine Co. v. Stewart, 60 Mont. 380;
General Electric Co. v. Stewart, 60 Mont. 387;
Perkins Manufacturing Co. v. Jordan, 200 Cal. 667;
Badger v. Crockett, 259 Pac. (Utah) 921.

III.

Chapter 149, Laws of Washington, Extraordinary Session 1925 Operates to Tax the Authorized Capital Stock of Appellant, Irrespective of the Amount Issued, Which is Arbitrary and Has No Reasonable Relation to the Value of the Privilege Exercised in Washington and is Therefore Violative of the Equal Protection Clause and Abridges the Corporation's Privileges and Immunities as a Citizen, in Violation of the Fourteenth Amendment to the Constitution of the United States.

The law of the state in which a corporation is incorporated alone confers any benefit on it; from it alone does it derive any benefit peculiar to its corporate structure, to its internal arrangement, whether to classes of stock or otherwise, and, of course, from that law alone does it derive any benefit with respect to the amount of its authorized capital stock. It follows as a necessary result that the state of incorporation may levy a tax on the corporation based on its capital stock, whether issued or unissued; but any other state is powerless to impose on that corporation any tax whatsoever based on its capital stock, where it does not represent property within the state nor bear any relation to it, and especially where only a part of it is issued, for it confers no benefit on it in respect to its capital stock or the amount or manner in which it issues it.

The only privilege that the State of Washington grants to appellant for the filing fee of $545.00 and an annual license fee of $580.00 is the privilege of doing business in the State, and nothing more, and grants to it no privilege on account of its unissued

capital stock, nor the use of the proceeds from the sale thereof, if eventually issued. It is self-evident that a tax upon appellant with an authorized capital stock of $45,000,000.00, with only $29,800,000.00 of it issued, and which does less than $500,000.00 worth of intrastate business in Washington, as compared with the same tax upon a like corporation with all of its stock issued and in use in this State, is a tax which has no relation to the value of the business done or the ability or right to transact business herein.

Until the case of *Air-Way Electric Appliance Corp. v. Day,* 266 U. S. 71, no case was presented in which the corporation complaining of the tax measured by its authorized capital stock had less than its total capital stock outstanding. Consequently, none of the cases of this Court heretofore cited present the question now discussed.

This Court held in the *Air-Way* case that the number of shares of a foreign corporation not subscribed or issued has no relation to the privilege held by the corporation in a state other than that in which it was incorporated, and is not a reasonable measure of such a fee. It further held that a fee based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock, or to its value, or to the amount of the foreign corporation's capital, property or business, intrastate or interstate.

In a subsequent decision, *Roberts & Schaefer Co. v. Emmerson,* 271 U. S. 50, this Court pointed out that the tax in the *Air-Way* case was held void not alone because it involved interstate commerce but because it was a discriminatory tax, since it resulted in a tax larger than the tax imposed upon other corporations with like privileges and like business and property

within the state but with a smaller capital authorized under the laws of the state of their creation.

Since the decision in the *Air-Way* case, three state courts have had presented to them the question of the constitutionality of the tax upon authorized capital stock where only a portion of the authorized stock was issued, as in this case, and each of the courts were unanimous in holding such taxes to be unconstitutional.

The O'Gara Coal Co. v. Emmerson, 326 Ill. 18;
Perkins Manufacturing Co. v. Jordan, 200 Cal. 667;
Minneapolis Steel & Machinery Co. v. Crockett, 263 Pac. (Utah) 926.

A perfunctory reading of the case of *Roberts & Schaefer Co. v. Emmerson, supra,* might lead one to think that certain expressions therein were intended to modify the *Air-Way* case; but a careful reading of the decision brings to light the peculiar facts on which the court permitted the state to levy a tax on unissued capital stock. The Corporation was a domestic corporation with all of its stock issued and all of its property located within the state, and it was engaged only in intrastate commerce and carried on no interstate commerce whatsoever.

In the cases of this Court heretofore cited it has been uniformly held that a state cannot tax property belonging to a foreign corporation neither located nor used within the confines of the state, and that a license fee based upon the entire authorized capital of the foreign corporation is essentially a tax upon its entire business and property everywhere. Thus it follows that if the State of Washington is powerless to im-

pose a tax on the business of appellant done outside of the State and on its property without the State, it cannot be contended that it has the power to levy a tax against appellant on $15,200,000.00 of unissued capital stock, which represents no property or business whatsoever, in or out of the State of Washington. Surely it cannot be contended that the $15,200,000.00 of unissued capital stock has any relation to the privilege held by appellant in Washington, and cannot in any manner be said to be a reasonable measure of such a fee. This stock may never be issued, and if not, then it in no wise affects the amount of business done or the opportunity of doing an increased business, either interstate or intrastate, in Washington or anywhere. And again, if this $15,200,000.00 of stock is issued, and the money is paid into the treasury of the corporation, it may be used in its entirety in another state, or in a foreign country, and thus it is unreasonable and unfair for the State of Washington to consider it in measuring the filing fee and annual license fee of appellant.

From the foregoing decisions it is evident that the necessary effect of the Washington legislation levying taxes or fees on unissued capital stock is to unlawfully discriminate against appellant, deny it the equal protection of the laws, and burden the interstate commerce transacted by it.

Conclusion.

It is respectfully submitted that the case of *Baltic Mining Co. v. Mass.*, 231 U. S. 68, which was relied on by the statutory court in reaching its decision, has been criticized and restricted by this Court in a long array of cases, and was finally by it overruled in the case

of *Alpha Portland Cement Co. v. Mass.*, 268 U. S. 203.

Should this Court find that the Baltic case has not yet been overruled, then it is submitted that this Court should now overrule it in its entirety, for the reasons given in reaching the conclusion therein are in absolute conflict with the principles laid down by this Court in *International Paper Co. v. Mass.*, 246 U. S. 135, wherein this Court restates the principles formulated in scores of preceding cases, beginning with *Western Union Tel. Co. v. Kansas*, 216 U. S. 1.

The undisputed facts set forth in the bill of complaint show that the appellant filed its articles of incorporation and began doing business in Washington thirty-five years before the enactment in the statute complained of, and acquired property of great value, adapted to carrying on both a local and interstate business, the local business being inconsiderable and incidental to, and in aid of, its interstate business, from which it is inseparable without serious impairment to the interstate business. It is also shown that appellant cannot withdraw from the State without great injury and loss to itself.

The facts further show that appellant has issued and outstanding less than two-thirds of its authorized capital stock, and that all of its property in Washington represents less than 1/1000 of its issued capital stock.

It is respectfully submitted that these facts bring the instant case within the principles laid down in the case of *International Paper Co. v. Mass.*, 246 U. S. 135, and, therefore, it is further respectfully submitted that the orders entered herein on May 8th, 1928, and June 7th, 1928, denying an interlocutory injunction

and dismissing the bill of complaint, are erroneous and should be reversed.

Respectfully submitted,

E. B. PALMER,
THOS. M. ASKREN,
S. W. BRETHORST,
THOS. CREIGH,
J. HARRY COVINGTON,
Solicitors for Appellant.

APPENDIX.

Sections 1 and 2, Chapter 149, Laws of the State of Washington, Extraordinary Session 1925:

"Section 1. That Section 3836 of Remington's Compiled Statutes, as amended by Section 1, Chapter 144, Session Laws of 1923, be amended to read as follows:

Section 3836. Every corporation incorporated under the laws of this state, or of any state or territory of the United States or of any foreign state or country, required by law to file articles of incorporation in the office of the secretary of state, shall pay to the secretary of state a filing fee in proportion to its authorized capital stock as follows:

Capital not exceeding $50,000.00, fee $25.00;

Capital of more than $50,000.00, and less than $100,000.00, fee $40.00;

Capital of $100,000.00, or more, and less than $150,000.00, fee $75.00;

Capital of $150,000.00, or more, and less than $200,000.00, fee $100.00;

Capital of $200,000.00, or more, and less than $300,000.00, fee $150.00;

Capital of $300,000.00, or more, and less than $400,000.00, fee $200.00;

Capital of $400,000.00, or more, and less than $500,000.00, fee $250.00;

Capital of $500,000.00, or more, and less than $1,000,000.00, fee $500.00;

Capital of $1,000,000.00, or more, and less than $2,000,000.00, fee $750.00; and $10.00 additional for each $1,000,000.00, or major fraction thereof, of capital stock in excess of $2,000,000.00; *Provided, however,* That the total filing fee for filing such articles of incorporation shall in no case exceed the sum of $3,000.00.

Section 2. That Section 3837 of Remington's Compiled Statutes, as amended by Section 2, Chapter 144, Session Laws of 1923, be amended to read as follows:

Section 3837. Every corporation, foreign or domestic, desiring to file in the office of the secretary of state articles amendatory or supplemental articles increasing its capital stock, or certificates of increase of capital stock, shall pay to the secretary of state the fees prescribed in the preceding section for the total amount to which the capital stock of the corporation is so increased, less the amount already paid for filing the original articles of incorporation, or original articles and amendatory or supplemental articles, or certificates of increase, and every such corporation desiring to file amendatory or supplemental articles decreasing, or certificates of decrease of capital stock, shall pay to the secretary of state a filing fee of $25.00. For filing of other amendatory or supplemental articles, it shall pay a fee of $10.00; Provided, however, That the total amount paid by any corporation for filing its original articles of incorporation and all of its articles amendatory or supplemental articles increasing its capital stock or certificates of increase of capital stock, shall in the aggregate in no case exceed the sum of $3,000.00, plus $10.00 for each separate instrument filed in addition to its original articles of incorporation."

Section 3, Chapter 149, Laws of the State of Washington, Extraordinary Session of 1925, amended Section 3841 of Remington's Compiled Statutes, to read as follows:

"Every corporation incorporated under the laws of this state, and every foreign corporation, having its articles of incorporation on file in the office of the secretary of state, shall, on or before the

first day of July of each and every year, pay to the secretary of state, for the use of the state, the following license fees in proportion to its authorized capital stock, as follows:

Capital of $50,000.00, or less, fee $15.00;

Capital in excess of $50,000.00, and up to and including $100,000.00, fee $25.00;

Capital in excess of $100,000.00, and up to and including $500,000.00, fee $50.00;

Capital in excess of $500,000.00, and up to and including $1,000,000.00, fee $100.00;

Capital in excess of $1,000,000.00, and up to and including $2,000,000.00, fee $150.00; and $10.00 for each $1,000,000.00, or fraction thereof of capital in excess of $2,000,000.00: *Provided, however,* That the total amount of such annual license fee shall in no case exceed $3,000.00. Every corporation failing to pay the said annual license fee, on or before the first day of July of any year, and desiring to pay the same thereafter, and before the first day of January next following, shall pay to the secretary of state, for the use of the state, in addition to the said license fee the following further fee, as a penalty for such failure, the sum of two dollars and fifty cents: *Provided, however,* That building and loan and savings and loan associations paying special fees provided for in the act under which same are incorporated shall not be required to pay the regular fee provided herein: *Provided, further,* That the annual fee required to be paid to the department of public works by any public service company shall be deducted from the annual fee provided herein, and the excess only shall be collected under this act."

Section 3842 of Remington's Compiled Statutes of Washington, 1922:

"No corporation shall be permitted to commence or maintain any suit, action or proceeding in any court of this state, without alleging and proving that it has paid its annual license fee last due. A certificate of the payment of such annual license fee, or any duplicate of such certificate under the seal of the secretary of state, shall be prima facie evidence of such payment; and the secretary of state is hereby required to issue such duplicate certificates, upon request, at a charge of twenty-five cents for each thereof. The state board of tax commissioners may institute suits to enforce the payment of any license fee, due from any corporation under this or any other law. Failure upon the part of any corporation to pay its annual license fee for a period of one year, from and after the date when such payment first became due, shall be prima facie evidence of the insolvency of such corporation, and the fact of such insolvency may be shown by the state or by any private person or corporation; Provided, that as to corporations now delinquent in the payment of their annual license fees for a period of one or more years, such presumption of insolvency shall not exist until after one year from the date of the passage of this act and the continuation of such delinquency. It shall be the duty of the secretary of state to strike from the records of his office the names of all incorporations which have neglected for a period of two years to pay their annual license fees; and any corporation thereafter organized may take and shall have the exclusive right to use the corporate name of any corporation so stricken from the records: Provided, that no corporate name shall be so stricken from the records for a period of one year, from the date of the passage of this act."

Section 3843 of Remington's Compiled Statutes of Washington, 1927:

"Every corporation whose name has been, or shall hereafter be, stricken from the records of the office of the secretary of state in pursuance of law for failure to pay its annual license fee for two years, is hereby authorized and permitted to apply to the secretary of state for reinstatement at any time within three years after its name has been stricken from the records of the office of the secretary of state. Any corporation stricken from the records and dissolved, as provided in this chapter, may at any time thereafter hold a meeting of stockholders, in the same manner as provided during its corporate existence, and pass such resolutions as may be necessary to close out its affairs and wind up the business of such corporation, and where such stricken and dissolved corporation has heretofore held such meetings of stockholders for the purpose of passing resolutions to wind up its affairs, such method of procedure is hereby validated and approved."

Section 3844 of Remington's Compiled Statutes of Washington, 1927 Condition—Prepayment of Fees and Penalty:

"Any corporation so applying for reinstatement shall at the time of its application pay to the Secretary of State for the use of the state all license fees and penalties then due from it and the additional sum of ten dollars for each and every year that its name has been stricken from the records, and upon the making of such application and such payment, it shall be the duty of the secretary of state to enter upon his record a notation that such corporation is reinstated."

Section 3846 of Remington's Compiled Statutes of Washington 1922:

"If, however, within the period named within which a corporation may make application to be reinstated such corporation shall not have made such application, the Secretary of State shall enter upon his records a notation that such corporation is dissolved, and it shall thereupon be dissolved and the trustees of such corporation shall hold the title to the property of the corporation for the benefit of its stockholders and creditors to be disposed of under appropriate court proceedings."

Section 3853 of Remington's Compiled Statutes of Wahington, 1927:

"Such corporation shall cause to be filed and recorded in the office of the secretary of state certified copy of its charter, articles of incorporation, memorandum of association, or certificate of incorporation, and a certified copy of each and all of the amendments or supplements to such charter, articles of incorporation, memorandum of association, or certificate of incorporation, and a certified copy of each and all of its certificates of increase or decrease of its capital stock, each of said instruments to be certified to by the officer who is the custodian of the same according to the laws of the state or territory, country or colony, where such corporation is incorporated, or who is authorized to issue certificates of incorporation according to the laws of such state, territory, or foreign country or colony. The instruments herein required to be filed and recorded shall be attested by such certifying officer under his hand and seal of office, which attestation shall be prima facie proof of the facts therein stated, and of the genuineness of the certificate. If such officer has no official seal, his certificate shall state that fact over his signature, and thereupon the secretary of state, or of the territory, in case of corporations within the United

States, and the consul-general, consul, vice-consul, deputy consul, consular agent, or commercial agent of the United States, at or nearest to the place where such certificate is made, in the case of corporations not within the United States, shall certify under his hand and seal of office to the genuineness of the signature of the officer making the certificate, and to the fact that at the time of making such certificate the person making the same held the office described in the certificate."

Section 3854 of Remington's Compiled Statutes of Washington, 1922:

"Such corporations shall also constitute and appoint an agent, who shall reside at the place in the state where the principal business of the corporation is to be carried on, to be designated as hereinafter required. Such appointment shall be in writing, signed by the president or chief officer of such corporation, and shall be attested by its corporate seal, and shall contain the name of the agent, his place of residence and the place where the principal business of such corporation is to be carried on, and shall authorize such agent to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within this state in which such corporation may be a party. The signature of such president or chief officer, attested by the corporate seal to such written appointment, shall be sufficient proof of the appointment of such agent. Such appointment, when duly executed, shall be filed for record in the office of the secretary of state by such corporation, and shall be there recorded; and such corporation shall have and keep continually some resident agent, empowered as aforesaid during all the time such corporation shall conduct or carry on any business

within this state, and service of any process, pleading, notice or other paper shall be taken and held as due service on such corporation. Such corporation may change its agent or its principal place of business, from time to time, by filing and recording with the secretary of state a new appointment, stating the change of such agent or the change in the principal place of business; and in the event such foreign corporation shall withdraw from this state and cease to transact business therein it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings and papers may be made, until the statute of limitations shall have run against anyone bringing an action against said corporation, which accrued prior to its withdrawal from this state. In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the secretary of state and the state of Washington, and the same shall be held as due and sufficient service upon such corporation."

Section 3855 of Remington's Compiled Statutes of Washington, 1922:

"Any foreign corporation doing business in this state which shall fail to comply with the provisions of the two preceding sections, shall be subject to a penalty of two hundred and fifty dollars to be recovered in a civil action to be instituted by the attorney general in the name of the state of Washington, upon his being furnished with a sworn statement of facts sufficient to justify such action."

Section 3861 of Remington's Compiled Statutes of Washington, 1922, provides:

> "Any agent of any foreign corporation, conducting or carrying on business within the limits of this State, for and in the name of such corporation, contrary to any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail for a term not exceeding three months, or by both such fine and imprisonment."

FILE COPY

FILED
DEC 26 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1928.

No. 278

THE CUDAHY PACKING COMPANY, a corporation,
Appellant,

v.

JAY GRANT HINKLE, Secretary of State, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, DENYING AN INTERLOCUTORY INJUNCTION, AND DISMISSING THE BILL OF COMPLAINT OF APPELLANT.

BRIEF OF APPELLEE

JOHN H. DUNBAR,
Attorney General of the State of Washington.

L. B. DONLEY,
Assistant Attorney General of the State of Washington.

Solicitors for Appellees.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

JAY THOMAS, PUBLIC PRINTER, OLYMPIA, WASH.

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1928.

No.....

THE CUDAHY PACKING COMPANY, a corporation,
Appellant,

v.

JAY GRANT HINKLE, Secretary of State, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, DENYING AN INTERLOCUTORY INJUNCTION, AND DISMISSING THE BILL OF COMPLAINT OF APPELLANT.

BRIEF OF APPELLEE

JOHN H. DUNBAR,
Attorney General of the State of Washington.

L. B. DONLEY,
Assistant Attorney General of the State of Washington.

Solicitors for Appellees.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

CONTENTS.

	Page
Statement of the Case	7
Argument	8–34
I. The doctrine of the case of Baltic Mining Company v. Massachusetts, 231 U. S. 68, has not been overruled	8–26
II. Cases involving excise taxes sought to be collected by a state from a corporation engaged solely in interstate commerce are not in point as is true where no maximum tax is fixed	26–28
III. The Washington excise tax on corporations engaged in intrastate commerce is reasonable in amount and has a reasonable maximum	28–32
IV. Some of the later state cases do not recognize the rule permitting reasonable taxes	32–34
Conclusion	35

CASES CITED.

Page

Airway Corporation v. Day, 266 U. S. 71.....21–22, 35

Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203.....20–21, 28, 32, 33

Atcheson, Topeka & Santa Fe Railway Co. v. O'Conner, 223 U. S. 280..... 9

Baltic Mining Co. v. Massachusetts, 231 U. S. 68.. .....8, 10–11, 13–15, 21–23, 25–27, 29–30, 32, 35

Buck Stove Co. v. Vickers, 226 U. S. 205..... 9, 28

Cheney Brothers Co. v. Massachusetts, 246 U. S. 147 28

Cudahy Packing Co. v. Hinkle, et al., 24 Fed. Rep. (2d), 124 15–20

Great Northern Railway Co. v. Washington, 147 Wash. 630, 267 Pac. 506..... 34

International Paper Co. v. Massachusetts, 246 U. S. 135 .....26–27, 30–31

International Text Book Co. v. Pigg, 217 U. S. 91.. 9, 28

Kansas City, etc. Ry. Co. v. Botkin, 240 U. S. 227..12–13

Kansas City, etc. Co. v. Styles, 242 U. S. 111..... 12

Locomobile Co. v. Massachusetts, 246 U. S. 146.... 27

Looney v. Crane Co., 245 U. S. 178.....22–25, 27

Ludwig v. Western Union Tel. Co., 216 U. S. 146... 9

Minnesota Steel and Machinery Co. v. Crockett, 263 Pac. (Utah) 926..... 33

O'Gara Coal Co. v. Emerson, 326 Ill. 18..... 33

Perkins Manufacturing Co. v. Jordan, 254 Pac. 551 32

Pullman Co. v. Kansas, 216 U. S. 56..... 9

Roberts & Schaefer Co. v. Emerson, 271 U. S. 50... 33

St. L. & S. W. Ry. Co. v. Arkansas, 235 U. S. 350... 12

Virginia Railway Signal Co. v. Virginia, 246 U. S. 500..... 12

Western Union Tel. Co. v. Kansas, 216 U. S. 1 .....8, 9, 11–12, 22–23, 25, 27

STATUTES CITED.

	Page
Section 3836, Remington's Compiled Statutes of Washington, 1922	29
Section 3841, Remington's Compiled Statutes of Washington, 1922	8
Section 4831, Remington's Compiled Statutes of Washington, 1922	29
Chapter 149, Laws of Washington, Extraordinary Session 1925	8, 28
Sections 1 and 2, Chapter 149, Laws of Washington, Extraordinary Session 1925	29
Section 3, Chapter 149, Laws of Washington, Extraordinary Session 1925	29
Article VIII, Section 3 (Commerce Clause) Federal Constitution	25
Fourteenth Amendment to the Federal Constitution	25

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1928.

No.....

THE CUDAHY PACKING COMPANY, a corporation,
Appellant,

v.

JAY GRANT HINKLE, Secretary of State, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, DENYING AN INTERLOCUTORY INJUNCTION, AND DISMISSING THE BILL OF COMPLAINT OF APPELLANT.

BRIEF OF APPELLEE

STATEMENT OF THE CASE.

We have nothing to add to the facts stated by appellant. These facts are a substantial setting forth of the principal allegations of the complaint of appellant as set forth on pages 1 to 19, inclusive, of the transcript of record.

ARGUMENT.

Briefly, it is the contention of the appellees that the act in question (ch. 149, L. Washington, Ex. Sess. 1925), amending section 3841, Remington's Compiled Statutes of Washington, 1922, is a reasonable exercise of the taxing power of the state upon the appellant as an excise tax for the privilege of doing business within the state of Washington; that the amount of the tax is reasonable and the basis thereof is reasonable inasmuch as a reasonable maximum is provided beyond which the tax may not go; that this is a case involving a corporation engaged in intrastate business, as well as interstate business, and that for this reason many of the cases cited by appellant are not in point; and that the tax in question is one of the most reasonable taxes of its kind which has been passed by any of the several states.

I.

THE DOCTRINE OF THE CASE OF *Baltic Mining Company v. Massachusetts,* 231 U. S. 68, HAS NOT BEEN OVERRULED.

A consideration of the numerous cases before this court relative to the validity of state excise taxes upon corporations where such corporations are engaged in both interstate and intrastate business shows that these cases may be divided into three separate classes.

The first grouping of cases is that headed by the case of *Western Union Tel. Co. v. Kansas,* 216 U. S.

1, a case holding that a state statute is invalid which requires as a prerequisite to the doing of business in a state by a foreign corporation engaged in both interstate and intrastate business, that such corporation pay a fee gradated in accordance with its capital stock and with no provision for a maximum amount of such tax to be paid. In that case the tax sought to be collected was in excess of $20,000.00 per year. This same rule is followed and affirmed in the case of *Pullman Co. v. Kansas,* 216 U. S. 56, and *Ludwig v. Western Union Tel. Co.,* 216 U. S. 146. The same rule was also affirmed and followed in the following cases:

International Text Book Co. v. Pigg, 217 U. S. 91;

Atcheson, Topeka & Santa Fe Ry. Co. v. O'Conner, 223 U. S. 280;

Buck Stove Co. v. Vickers, 226 U. S. 205.

In all of these cases the rule is laid down, and we do not believe it has ever been departed from, that where an excise tax is charged a foreign corporation by one of the several states as a prerequisite to doing business, such tax being based upon the authorized capital stock of such corporation and no reasonable maximum is provided, then such tax is invalid as constituting a direct burden upon interstate commerce. We believe this rule to be a correct statement of the law.

However, there is a second line of cases announcing a modification of the above rule in certain cases.

This line of cases is headed by the case of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68. This is the first and leading case in support of our proposition that an excise tax may be gradated according to the amount of the authorized stock of a corporation, and if a reasonable maximum is fixed, such law will be upheld as a reasonable exercise of the taxing power of the state and will not be held to be a burden upon interstate commerce. The statute considered in the *Baltic Mining Company* case, *supra,* provided by its terms that every foreign corporation was required as a prerequisite to doing business in the state of Massachusetts to pay an excise tax of one-fiftieth of one per cent. of the par value of its authorized capital stock, with the express provision, however, that such excise tax should not in any one year exceed the sum of $2,000.00.

This court held expressly that the mere fact that a corporation is engaged in interstate business, as well as intrastate business, does not exempt its property from taxation; that the state has a right to exclude a foreign corporation from doing business within its borders so long as no principle of the Federal Constitution is violated; and that the state may prescribe conditions upon which a corporation may continue to do business in the state unless some constitutional right is denied in the exclusion thereof. It is further held that under the Massachusetts statute considered therein the tax must be construed as strictly an excise tax for the privilege of transacting

business within the state and for benefit of the protection of the laws thereof. It is further held that the several states may impose excise taxes upon corporations for the privilege of doing business within its borders and having the benefit of the protection of the laws thereof in cases where such corporations are not exclusively engaged in interstate commerce, and that such a tax is not a direct burden upon interstate commerce. The Massachusetts statute was sustained and held to be not in violation of the Constitution of the United States, and the earlier cases of the first group above cited are expressly distinguished, the court using the following language (p. 85):

"Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. * * * A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state, has been sustained."

A careful reading of the earlier cases above cited, beginning with the case of *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, makes it plain that the only distinction between the Kansas statute, disapproved by this court, and the Massachusetts statute, approved by this court in the case of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68, *supra,* is that there was no reasonable maximum provided for in the Kansas

statute, and there was a reasonable maximum provided for in the Massachusetts statute. No other distinction between the statutes is possible. This case is followed and approved in a number of cases in this court.

St. L. & S. W. Ry. Co. v. Arkansas, 235 U. S. 350;

Kansas City, etc., Ry. Co. v. Botkin, 240 U. S. 227;

Kansas City, etc. Co. v. Styles, 242 U. S. 111;

Virginia Railway Signal Co. v. Virginia, 246 U. S. 500.

In the case of *Kansas City etc. Ry. Co. v. Botkin,* 240 U. S. 227, the court had under consideration the corporation excise tax of the state of Kansas. This statute provided for an excise tax to be gradated according to the paid-up capital stock of the foreign corporation involved. The only material distinction between this statute and that discussed in the case of *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, is that the latter statute provided that the fee should in no event exceed the sum of $2,500.00 in any one year, which provision was not in the earlier statute. The latter statute was upheld by this court as a reasonable exercise of the taxing power, and in discussing this matter, the court said (*Kansas City, etc. Ry. Co. v. Botkin,* 240 U. S. 227, p. 235):

"In the present case, the tax is not laid upon transactions in interstate commerce, or upon receipts from interstate commerce either separately or intermingled with other receipts. It does not fluctuate

with the volume of interstate business. It is not a tax imposed for the privilege of doing an interstate business. It is a franchise tax—on the privilege granted by the state of being a corporation—and while it is graduated according to the amount of paid up capital stock, the maximum charge is $2,500.00 in the case of all corporations having a paid up capital of $5,000,000.00 or more. This is the amount imposed in the present case, where the corporation has a capital of $31,660,000.00. We find no ground for saying that a tax of this character thus limited is in any sense a tax imposed upon interstate commerce. * * * Undoubtedly, a tax may be in form a privilege tax, and yet, in substance, may be a tax on property. But the present tax cannot be regarded as a property tax at all."

This rule is pursuant to the rule laid down in the case of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68, wherein the court lays down the following fundamental principles (p. 82-83):

"* * * The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. *United States Express Co. v. Minnesota,* 223 U. S. 335, 344. It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state, has been sustained. *Maine v. Grand Trunk Railway Co.,* 142 U. S. 217; *Provident Institution v. Massachusetts,* 6 Wall. 611; *Hamilton Co. v. Massachusetts,* 6 Wall. 632; *Flint v. Stone-Tracy Co.,* 220 U. S. 107, 162-5; *United States Express Co. v. Minnesota, supra.*

"The right of a state to exclude a foreign corporation from its borders, so long as no principle of the

Federal Constitution is violated in such exclusion, has been repeatedly recognized in the decisions of this court, and the right to prescribe conditions upon which a corporation of that character may continue to do business in the state, unless some contract right in favor of the corporation prevents or some constitutional right is denied in the exclusion of such corporation, is but the correlative of the power to exclude. *Hammond Packing Co. v. Arkansas,* 212 U. S. 332, 343; *Southern Pacific Co. v. Denton,* 146 U. S. 202; *Barron v. Burnside,* 121 U. S. 186; *Insurance Co. v. Morse,* 20 Wall. 445; *Herndon v. Chicago, Rock Island & Pacific Ry. Co.,* 218 U. S. 135. For example, a state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law, or you may transact business in interstate commerce subject to the regulatory power of the state. To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union. * * *"

In discussing the effect of the provision limiting the maximum tax to be collected to $2,000.00 per annum, the court concludes (p. 87):

"Further, the Massachusetts statute limits the tax to a maximum of $2,000.00. The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

The appellant contends that the doctrine announced in the *Baltic Mining Co.* case, and followed by other cases, as hereinabove set forth, has been abandoned and overruled by later cases. In discussing this phase of the case Judge Cushman of the District Court, in his opinion in the case at bar—*Cudahy Packing Co. v. Hinkle, et al.,* 24 Fed. Rep. (2d), 124, quoting from page 127-30 uses the following language:

"Plaintiff's case comes to this: Unless the case of *Baltic Mining Co. v. Massachusetts,* and the *White Mfg. Co. v. Massachusetts,* 231 U. S. 68, often spoken of as the *Baltic Mining Co.* case, have been overruled in so far as they would apply to a case such as the present, plaintiff cannot prevail.

"It is contended that the case is overruled by the following: *Looney v. Crane Co.,* 245 U. S. 178; *International Paper Co. v. Massachusetts,* 246 U. S. 135; *Cheney Bros. Co. v. Massachusetts,* 246 U. S. 147; *Air-Way Elec. Appliance Corp. v. Day,* 266 U. S. 71; *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203; *Hanover Fire Ins. Co. v. Carr,* 272 U. S. 494.

"First, the contention is that the *Baltic Mining Co.* case, in which the excise tax measured by the authorized capital stock with a maximum of $2,000.00 was upheld, in a suit by a foreign corporation engaged in interstate and intrastate business in the taxing state, has been expressly overruled by *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203. In the latter case the court said:

" 'It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation

of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of the *Baltic Mining Co. v. Mass.*, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved.'

"The Alpha Portland Cement Company was engaged solely in interstate commerce, and any license fee or tax was for that reason bound to be a charge or burden upon such commerce. Courts have many times had occasion to say, in effect, that in considering the language used in a decision, the particular point considered should always be borne in mind. The court called attention to this subject in the *Baltic Mining Co.* and *S. S. White Mfg. Co. v. Commonwealth of Massachusetts:*

" 'Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases.'

"In the case of *Air-Way Corp. v. Day, supra,* there was no maximum fixed for the annual license fee; the brief of appellant, page 73 of the report, shows that the attack upon the law was because there was not a reasonable limitation in the maximum amount of this fee. The appellant in that case besides using property owned by it in the state upon which it paid a general property tax, did an annual intrastate business amounting to $70,802.30; for the right of doing which business the lower court upheld an annual fee of $14,926, being about 21 per cent of the intrastate business done. Consideration was given by the Supreme Court to the amount of this charge; the court in reversing the lower court saying:

" 'The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is

imposed; it may be said that some relation to such value is a reasonable requirement. Indeed, under the constitution and laws of Ohio, a tax on value of the privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value thereafter. *Southern Gum Co. v. Laylin,* 66 Ohio St. 578. That value depends on the "property owned and used and business transacted" in Ohio. Sec. 8728-11.'

"In the instant case, for the right to do an annual intrastate business in Washington, which if the negative pregnant rule be applied, approximates $662,500, it is asked to pay an annual license fee of $580.00. It is obvious, other things being equal, that there is far less danger of such a fee or tax,—less than 1-10 of 1 per cent, upon the intrastate business transacted becoming a burden upon plaintiff's interstate business than was true in the foregoing case.

"In *Cheney Bros. Co. v. Massachusetts,* 246 U. S., 147, the act regulating the amount of an excise tax for doing business by the par value of its authorized capital stock with a maximum of $2,000, upon such tax, the same sections of the Massachusetts law were considered by the court that it had considered in the *Baltic Mining Company* case, and were held valid as to those corporations doing both local and interstate business and void as to a company solely engaged in interstate business. Of one of the companies doing an interstate and local business, it was said:

" 'This company was incorpated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this

is a domestic business,—inducing one local merchant to buy a particular class of goods from another,—and may be taxed by the state regardless of the motive with which it is conducted.'

"In *International Paper Co. v. Massachusetts,* 246 U. S. 135, a statute of Massachusetts removing such $2,000.00 limit on the maximum amount of such excise tax was held invalid, the suit being one by a foreign trading corporation largely engaged in interstate commerce, and whose business and property was largely in other states.

"In this case, the court said of the *Baltic Mining Company* case:

" 'In holding otherwise the state court failed to observe the restricted and limited grounds of our rulings in *Baltic Mining Co. v. Massachusetts* and the other cases dealt with and distinguished in the excerpt just quoted from our opinion in *Looney v. Crane Company.* True, the tax sustained in *Baltic Mining Co. v. Massachusetts* was imposed under the first of the statutes now in question, the one of 1909; but at that time the statute placed a maximum limit on the amount of tax which as shown in that and other cases, was a material factor in the decision.'

"In *Looney v. Crane Co.,* 245 U. S. 178, a Texas statute imposing upon corporations permit charges and excise taxes, both charges being without a maximum fixed as to their amount, in a suit by a foreign trading corporation engaged largely in interstate business, was held invalid. This case follows the rule laid down in *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1; *Pullman Co. v. Kansas,* 216 U. S. 56; *Ludwig v. Western Union Telegraph Co.,* 216 U. S. 146; *International Textbook Co. v. Pigg,* 217 U. S. 91; *A. T. & S. F. Ry. Co. v. O'Connor,* 233 U. S. 280, 285.

"Of cases including the *Baltic Mining Company* case, the court in *Looney v. Crane Company* said:

" 'But despite the controlling decisions dealing with cases in substance identical in fact and principle

with the case here presented and the effect given to them in Texas as to one of the statutes here involved, it is now insisted that the statutes are repugnant to the Constitution of the United States and that error was committed in deciding to the contrary. This is rested on cases decided since those to which we have referred. *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68; *St. Louis Southwestern Ry. Co. v. Arkansas,* 235 U. S. 350; *Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas,* 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles,* 242 U. S. 111. The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the case relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases.'

"The court held that the *Baltic Mining Company* case and other cases mentioned by it, did not overrule the *Western Union Telegraph Co.* and other cases. It follows that the cases relied upon as overruling the *Baltic Mining Co.* case, unless they go farther than the earlier cases, do not do so. *Hanover Fire Ins. Co. v. Harding,* 272 U. S. 494, has no bearing upon the present question, In the case of *Roberts and Schaefer Co. v. Emmerson,* 271 U. S. 50,—the *Baltic Mining Company* case was not mentioned, furthermore, that was a domestic corporation doing a purely intrastate business and the tax attacked was upheld. The court said:

" 'We cannot say that the value of the corporation franchise may not be measured by the number of no-par shares which may be issued rather than their value when issued.'

"The Supreme Court has also said, in *Hump Hairpin Co. v. Emmerson,* 258 U. S. 290:

" 'While a state may not use its taxing power to

regulate or burden interstate commerce (*United States Express Co. v. Minnesota,* 223 U. S. 335; *International Paper Co. v. Massachusetts,* 246 U. S. 135), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal consitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce), that the principle of the cases so holding must be regarded as a settled exception to the general rule. *Maine v. Grand Trunk Ry. Co.,* 142 U. S. 217; *Wisconsin & Michigan Ry. Co. v. Powers,* 19 U. S. 279; *Flint v. Stone Tracy Co.,* 220 U. S. 107; *United States Express Co. v. Minnesota,* 223 U. S. 335; *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68; *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles,* 242 U. S. 111; *United States Glue Co. v. Oak Creek,* 247 U. S. 321, 326-327. The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.' "

We now come to a discussion of the third line of cases upon which appellant relies in the case at bar. Appellant, in its brief, relies principally upon the case of *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203, and particularly that portion thereof wherein the court says (p. 218):

"The amount demanded is unimportant where there is no legitimate basis for the tax. So far as

the language of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68 * * * tends to support a different view, it conflicts with conclusions reached in later opinions, and is now definitely disapproved."

This language, if considered independently and without reference to the case in which it appears and the peculiar facts and circumstances of that case, might well be considered as an overruling of the *Baltic Mining Co.* case, and the doctrine therein expressed upholding the validity of an excise law providing for a graduated corporation excise tax. However, in discussing the facts of the case, Judge Cushman in his opinion in the case at bar, 22 Fed. (2nd), page 124, uses the following language (p. 128):

"The Alpha Portland Cement Company was engaged solely in interstate commerce, and any license fee or tax was for that reason bound to be a charge or burden upon such commerce. Courts have many times had occasion to say, in effect, that in considering the language used in a decision, the particular point considered should always be borne in mind."

So, then, we find that the *Alpha Portland Cement Company* case, *supra,* relied upon by appellant, is only authority for the proposition that where a foreign corporation is engaged solely in interstate commerce, the several states may not impose an excise tax upon it as a prerequisite to its engaging in such interstate commerce, and that the *Baltic Mining Company* case, in so far as it might affect such a situation, is expressly overruled.

Reliance is placed in the case of *Airway Corporation v. Day,* 266 U. S. 71. An examination of this

case shows that there was no maximum, reasonable or otherwise, fixed for the annual license fee, and that for this reason it was held to be unreasonable. The facts as shown in the opinion indicate that the state of Ohio was attempting to collect a tax of $14,926.00 from this corporation which was doing an intrastate business amounting to only $70,802.30 per annum. An examination of all the cases relied upon by the appellant as overruling the doctrine of the case of *Baltic Mining Co. v. Massachusetts, supra,* shows that this court has never held a corporation excise tax of any of the several states to be invalid where such tax was graduated in accordance with the authorized capital stock of the corporation, and where the corporation was engaged in intrastate business, and *where a reasonable maximum fee was provided for in the statute.*

The case of *Looney v. Crane Co.,* 245 U. S. 178, is a case in all respects similar to the case of *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, *supra.* The tax there under consideration imposed by the state of Texas levied an excise tax upon foreign corporations based upon the authorized capital stock of such corporations. This tax was held to be a burden upon interstate commerce. The distinguishing point between the *Looney* case *supra,* and the *Baltic Mining Company* case, *supra,* is that the Texas statute made no provision whatever for a maximum fee, reasonable or otherwise, and that the Crane Company, with an authorized capital of $17,000,000.00, and with sur-

plus and undivided profits of $8,130,000.00 was by the act required to pay an annual tax which amounted to approximately $17,000.00. In this case the court discusses the proposition that the *Baltic Mining Company* case, and its companion cases, have the result of overruling the case of *Western Union Tel. Co. v. Kansas, supra,* and companion cases hereinbefore discussed, and in disposing of this question the court says (*Looney v. Crane,* 245 U. S. 178—quoting from page 189):

"It is now insisted that the statutes are not repugnant to the Constitution of the United States and that error was committed in deciding to the contrary. This is rested on cases decided since those to which we have referred. *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68; *St. Louis Southwestern Ry. Co. v. Arkansas,* 235 U. S. 350, *Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas,* 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles,* 242 U. S. 111. The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases.

"The demonstration of error in the argument which results from this situation might well cause us to go no further in its consideration. In view, however, of the gravity of the subject to which the argument relates and the misconception and resulting confusion in doctrine which might result from silence, we briefly notice it. In the first place it is

apparent in each of the cases that as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clause of the Constitution, it came to be considered whether by their necessary operation and effect they were repugnant to the Constitution in the particulars stated, and this inquiry it was expressly pointed out was to be governed by the rule long ago announced in *Postal Telegraph Cable Co. v. Adams,* 155 U. S. 688, 698, that 'The substance and not the shadow determines the validity of the exercise of the power.' In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such result. These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. It is thus manifest on the face of all of the cases that they in no way sustained the assumption that because a violation of the Constitution was not a large one it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Consitution.

"It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles expounded in the previous cases upon which we have rested our conclusion, since the later cases rested upon particular provissions in each particular case which it was held caused the general and recognized rule not to be applicable."

From the foregoing it must be apparent that the

basic principles of law announced in the earlier cases of the group headed by the case of *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, are not affected in any manner by the case of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68, and companion cases thereto, and that these cases, in turn, and the basic principles therein set forth, are not in any manner affected or overruled by the case of *Looney v. Crane,* 245 U. S. 178, and cases classified therewith by the appellant in its brief. We believe these three groups of cases are readily distinguishable upon the facts, and that this court has so distinguished them. The basic principle announced in the earlier line of cases is that an excise tax graduated in accordance with the capital stock of a foreign corporation where no maximum is fixed, is unreasonable and in violation of the Commerce Clause and the Fourteenth Amendment to the Constitution of the United States. The basic principle in the second group of cases is that the state has the right to levy an excise tax graduated in accordance with the amount of the capital stock of a foreign corporation, and in cases where such tax is reasonable and a reasonable maximum is fixed, the tax is not objectionable to the provisions of the Constitution of the United States. The third class of cases reaffirms the rules announced in the first line of cases, and, in addition thereto, lays down the proposition more firmly, if possible, that where a corporation is engaged in a state solely in interstate business, no excise tax at all may be collected, however

small the amount may be, or by what method its amount may be determined.

We earnestly submit that the doctrine set forth in the case of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68, is a fair and complete statement of the law as it is and ought to be when applied to facts such as in the case at bar and that the case has not been overruled or modified.

II.

Cases Involving Excise Taxes Sought to be Collected by a State From a Corporation Engaged Solely in Interstate Commerce are not in Point as is True Where no Maximum Tax is Fixed.

A number of cases have been cited by the appellant wherein excise taxes have been by this court set aside and held invalid where the sole business of the corporation in the state was interstate as distinguish from intrastate commerce. The case of *International Paper Co. v. Massachusetts,* 246 U. S. 135, is one of these cases. In the *Baltic Mining Co.* case, *supra,* the statute of Massachusetts of 1909 was considered, and this statute, which provided for a graduated excise tax on corporations with a $2,000.00 maximum, was upheld. In the *International Paper Co.* case, *supra,* the court considered the statute of Massachusetts of 1914 relative to excise taxes on corporations, and pointed out that under the construction placed upon it by the highest state court of Mas-

sachusetts, the 1914 tax act did not provide a maximum, but provided for a graduated tax on the authorized capital of a corporation, regardless of amount and without maximum. The court held that under the peculiar provisions of the 1914 act, as interpreted by the Massachusetts court, the law came under the rules announced in the case of *Western Union Tel. Co. v. Kansas, supra, Looney v. Crane Co., supra,* and other similar cases, and the law was void as being a violation of the Commerce Clause and the Fourteenth Amendment of the Federal Consitution. The case is specifically distinguished from the *Baltic Mining Co.* case, and in this connection the court used the following language (*International Paper Co. v. Massachusetts,* 246 U. S. 135, quoting from page 145):

"In holding otherwise the state court failed to observe the restricted and limited grounds of our rulings in *Baltic Mining Co. v. Massachusetts* and the other cases dealt with and distinguished in the excerpt just quoted from our opinion in *Looney v. Crane Company.* True, the tax sustained in *Baltic Mining Co. v. Massachusetts* was imposed under the first of the statutes now in question, the one of 1909; but at that time the statute placed a maximum limit on the amount of the tax which, as shown in that and other cases, was a material factor in the decision. This limitation, as the state court holds was 'removed' by the statute of 1914, which also made a partial reduction in the tax rate."

The rule announced in the *International Paper Co.* case, *supra,* is followed by this court in the case of *Locomobile Co. v. Massachusetts,* 246 U. S. 146.

Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, is a consolidation of seven separate and distinct cases, and each receives consideration based upon the peculiar facts of the case. In some of these seven consolidated cases the corporation in question was held to be doing entirely interstate business, and therefore not liable to the tax, while other corporations, being engaged also in intrastate business, it was held that the tax was valid and might be collected.

In the case of *International Text Book Co. v. Pigg,* 217 U. S. 91, the court held that where a statute of a state makes the payment of a fee and the filing of a statement a prerequisite to the carrying on of purely interstate business, such statute is void as being a direct burden on interstate commerce. This rule is affirmed in the following cases:

Buck Stove Co. v. Vickers, 226 U. S. 205;
Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203.

III.

The Washington Excise Tax on Corporations Engaged in Intrastate Commerce is Reasonable in Amount and has a Reasonable Maximum.

The Washington statute which is involved, chapter 149, Laws of Washington, Ex. Sess. 1925, is set forth in full in the brief of appellant as a part of the appendix thereto. An examination of this statute shows that in so far as corporations such as the ap-

pellant in this case are concerned, the excise fee to be paid is $100.00 for the first $1,000,000.00 capitalization, $50.00 for the second million and $10.00 for each $1,000,000.00 or fraction thereof of capital in excess of $2,000,000.00, provided, however, that the total amount of such annual license fee shall in no case exceed $3,000.00 (sec. 3, ch. 149, L. Ex. Sess. 1925, amending sec. 4831, Rem. Comp. Stat.). The law relative to the payment of filing fees provides, in so far as applicable to a corporation such as appellant, is that for the first $2,000,000.00 of capitalization, a filing fee of $750.00 shall be paid and the additional sum of $10.00 for each $1,000,000.00 or major fraction thereof of capital stock in excess of $2,000,000.00, with the proviso, however, that the total filing fee shall in no event exceed the sum of $3,000.00 (secs. 1 and 2, ch. 149, L. Ex. Sess. 1925; sec. 3836, Rem. Comp. Stat.)

The statute considered and upheld by this court in the case of *Baltic Mining Co. v. Massachusetts, supra,* provided for payment of an annual excise of one-fiftieth of one per cent of the par value of its authorized capital stock with a maximum of $2,000.00. The court further says, in the *Baltic Mining Co.* case *supra,* (p. 85) that:

"Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. * * *

"An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the state."

The fundamental principles of law governing the case at bar have been laid down by this court in the case of *International Paper Co. v. Massachusetts*, 246 U. S. 135 (quoting from pages 141-2):

"1. The power of a State to regulate the transaction of a local business within its borders by a foreign corporation—meaning a corporation of a sister State—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

"2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

"3. Consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State.

"4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State.

"5. A license fee or excise of a given per cent of the entire authorized capital of a foreign corpora-

tion doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

"6. When tested, as it must be, by its substance —its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconsitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State."

Applying these rules to the Washington law under consideration here, we submit that if a state has the right to levy an excise tax at all upon foreign corporations engaged in intrastate commerce, as well as interstate commerce, and has the right to use as a measure for such tax the authorized capital stock of such a corporation, the Washington tax is more equitable and more reasonable than any tax considered by this court in any of the cases cited.

In the case at bar we find that the appellant corporation has an authorized capital of $45,000,000.00, of which $29,800,000.00 has been issued, and that this corporation is being required to pay an annual license fee of only $580.00, and that the filing fee for this corporation amounted only to $1,180.00. It would be necessary, before the maximum would be reached, that a corporation be capitalized in excess

of $250,000,000.00. If this court is to consider the amount of the tax and the reasonableness of the method of graduation, there seems no escape from the conclusion that the Washington tax is reasonable, just and equitable. We are unable to find in any of the later cases any receding from the rule of law laid down in the *Baltic Mining Co.* case to the effect that "every case involving the validity of a tax must be decided upon its own merits * * *."

IV.

Some of the Later State Cases do not Recognize the Rule Permitting Reasonable Taxes.

In a number of the states the highest courts have held that the case of *Alpha Portland Cement Co. v. Massachusetts, supra,* has the effect of overruling the doctrine announced in the *Baltic Mining Co.* case, *supra,* and have held laws similar in some particulars to the Washington law involved to be invalid. Such is the holding in the case of *Perkins Manufacturing Co. v. Jordan,* 254 Pac. 551. The law under consideration there was graduated so that a maximum fee of $1,000.00 was provided for, which maximum would be required of a corporation having a capitalization of $10,000,000.00. The California court falls into the error, as we view it, of holding the *Baltic Mining Co.* case, *supra,* to be definitely disapproved in all particulars by the case of *Alpha Portland Cement Co. v. Massachusetts, supra.* It is our contention, as we have hereinbefore set forth,

that the doctrine announced in the *Alpha Portland Cement Co.* case only applies to corporations engaged solely in interstate commerce.

The same conclusion, which we believe erroneous, is the basis of the decision in *Minnesota Steel and Machinery Co. v. Crockett,* 263 Pac. 926 (Utah).

In the case of *O'Gara Coal Co. v. Emerson,* 326 Ill. 18, the supreme court of Illinois held an excise tax upon corporations based upon all its issued capital stock without maximum fee to be invalid and unreasonable on the constitutional grounds urged in the case at bar. This case may be distinguished from the case at bar because no maximum fee was provided, and for that reason a tax upon unissued stock would necessarily be discriminatory as against a corporation of similar size which had all of its stock issued. No maximum being provided, it is also a tax upon all the property of the company, and not, as in the case at bar, a tax measured by the authorized capital stock of the corporation. The doctrine therein set forth has not received the approval of this court.

Roberts & Schaefer Co. v. Emerson, 271 U. S. 50.

In that case the court permitted the state to levy a tax on unissued capital stock, and the law under consideration was that of the state of Illinois. It is urged by appellant that that case had to do only with a corporation engaged in intrastate commerce. Conceding this to be true, the fact remains that this

court has held that a tax placed upon unissued, as well as issued, stock, is not invalid as being discriminatory.

The supreme court of the state of Washington, in the case of *Great Northern Railway Co. v. Washington,* 147 Wash. 630, 267 Pac. 506, has held the law under consideration to be invalid in so far as it affects common carriers engaged in interstate business. This decision is based upon the proposition that such corporations are not at liberty to withdraw from the state, and that therefore the tax is a direct burden upon interstate commerce. The court, however, adheres to the general rule that a corporation may not do business in a state which did not create it save by its consent, and that it is at liberty to withhold such consent without reason, pointing out, however, that an exception exists in the case of a foreign corporation engaged in interstate commerce and under the jurisdiction of the Interstate Commerce Commission. By inference, at least, the supreme court of Washington has held, in the case above cited, that the Washington law involved in the case at bar is constitutional and valid in so far as it affects corporations not in the same class as the Great Northern Railway Company. The court further expressly holds that the excises imposed under the Washington statute are not unreasonable.

CONCLUSION.

We respectfully submit to the court that the doctrines laid down by the court in the *Baltic Mining Co.* case have not been overruled or superseded by later decisions, and that the five rules of law set out in the case of *Airway Corporation v. Day* clearly state the law, and that this court should uphold the right of the several states to require excise taxes from foreign corporations in cases where such excise taxes are reasonable in amount and are graduated upon the authorized capital stock of the corporation, and where a reasonable maximum is provided.

We respectfully submit that the decision of the statutory Federal court is correct and should be affirmed.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General of the State of Washington.

L. B. DONLEY,
Assistant Attorney General of the State of Washington.

Solicitors for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 278.—October Term, 1928.

The Cudahy Packing Company, a Corporation, Appellant, *vs.* Jay Grant Hinkle, Secretary of State, and John H. Dunbar, Attorney General, of the State of Washington.	Appeal from the District Court of the United States for the Western District of Washington.

[February 18, 1929.]

Mr. Justice McReynolds delivered the opinion of the Court.

Appellant is incorporated under the laws of Maine. Its authorized capital stock is $45,000,000. Less than $30,000,000 has been issued and the total value of the corporate property does not exceed that sum. It does an extensive business in meats and foodstuffs throughout the Union and abroad. During 1916 when the capital stock was $20,000,000 the articles of incorporation were duly filed with the proper state officer and the corporation began to carry on closely associated interstate and intrastate business in Washington. Its property therein is now worth $40,000. Gross sales by the corporation for the year ended October 31, 1926, were $231,750,000. Of these $1,313,275 were made in Washington, less than half being intrastate.

The statutory provisions here important appear in the sections of Remington's Compiled Statutes of Washington mentioned below.

Sec. 3852 authorizes foreign corporations to do business within the State as those organized under her laws upon compliance with conditions prescribed by Secs. 3853-3854.

Sec. 3853 requires every foreign corporation to file with the Secretary of State a certified copy of its charter, etc., and Sec. 3854 requires appointment of a local agent.

Sec. 3836 (as amended by Chap. 149, Extraordinary Session, 1925) directs that every local and foreign corporation required by

law to file its articles with the Secretary of State shall pay graduated filing fees, not above $3,000, reckoned upon its authorized capital stock.[1]

Sec. 3837 requires every corporation, foreign or domestic, desiring to file with the Secretary of State articles amendatory or supplemental articles increasing its capital stock to pay the fees prescribed in the preceding section less any sum theretofore paid.[2]

Sec. 3841, (as amended by Chap. 149, Extraordinary Session, 1925) requires corporations, foreign and domestic, to pay annual

---

[1]Section 3836. Every corporation incorporated under the laws of this state, or of any state or territory of the United States or of any foreign state or country, required by law to file articles of incorporation in the office of the secretary of state, shall pay to the secretary of state a filing fee in proportion to its authorized capital stock as follows:

Capital not exceeding $50,000, fee $25;

Capital of more than $50,000, and less than $100,000, fee $40;

Capital of $100,000, or more, and less than $150,000, fee $75;

Capital of $150,000, or more, and less than $200,000, fee $100;

Capital of $200,000, or more, and less than $300,000, fee $150;

Capital of $300,000, or more, and less than $400,000, fee $200;

Capital of $400,000, or more, and less than $500,000, fee $250.

Capital of $500,000, or more, and less than $1,000,000, fee $500;

Capital of $1,000,000, or more, and less than $2,000,000, fee $750; and $10 additional for each $1,000,000, or major fraction thereof, of capital stock in excess of $2,000,000; Provided, however, That the total filing fee for filing such articles of incorporation shall in no case exceed the sum of $3,000.

[2]Section 3837. Every corporation, foreign or domestic, desiring to file in the office of the secretary of state articles amendatory or supplemental articles increasing its capital stock, or certificates of increase of capital stock, shall pay to the secretary of state the fees prescribed in the preceding section for the total amount to which the capital stock of the corporation is so increased, less the amount already paid for filing the original articles of incorporation, or original articles and amendatory or supplemental articles, or certificates of increase, and every such corporation desiring to file amendatory or supplemental articles decreasing, or certificates of decrease of capital stock, shall pay to the secretary of state a filing fee of $25. For filing of other amendatory or supplemental articles, it shall pay a fee of $10; Provided, however, That the total amount paid by any corporation for filing its original articles of incorporation and all of its articles amendatory or supplemental articles increasing its capital stock or certificates of increase of capital stock, shall in the aggregate in no case exceed the sum of $3,000, plus $10 for each separate instrument filed in addition to its original articles of incorporation."

license fees, not above $3,000, reckoned upon authorized capital stock.[3]

Secs. 3842, 3843, 3844, 3846, 3855, and 3861 provide heavy penalties for failure to pay prescribed filing fees and license taxes.

Filing fees because of the increased capital and license taxes for 1927, both reckoned upon the authorized capital stock, were demanded of appellant. Penalties for failure to comply were threatened. By an original bill in the United States District Court, Western District of Washington, it set up the above-stated facts and asked an appropriate injunction to prevent enforcement of the demands. A court of three judges heard the cause, denied a preliminary injunction, and dismissed the bill for want of equity.

Looney v. *Crane Co.*, 245 U. S. 178, 187, examined Texas statutes which required foreign corporations to pay permit and franchise taxes graduated according to authorized capital stock and declared them in conflict with the Federal constitution because they imposed "direct burdens upon interstate commerce, and, moreover, exerted the taxing authority of the state over property and rights which were wholly beyond the confines of the state, and not subject to its jurisdiction, and therefore constituted a taking without due pro-

[3]Secion 3841. Every corporation incorporated under the laws of this state, and every foreign corporation, having its articles of incorporation on file in the office of the secretary of state, shall, on or before the first day of July of each and every year, pay to the secretary of state, for the use of the state, the following license fees in proportion to its authorized capital stock, as follows:

Capital of $50,000, or less, fee $15;

Capital in excess of $50,000, and up to and including $100,000, fee $25;

Capital in excess of $100,000, and up to and including $500,000, fee $50;

Capital in excess of $500,000, and up to and including $1,000,000, fee $100;

Capital in excess of $1,000,000, and up to and including $2,000,000, fee $150; and $10 for each $1,000,000, or fraction thereof of capital in excess of $2,000,000: Provided, however, That the total amount of such annual license fee shall in no case exceed $3,000. Every corporation failing to pay the said annual license fee, on or before the first day of July of any year, and desiring to pay the same thereafter, and before the first day of January next following, shall pay to the secretary of state, for the use of the state, in addition to the said license fee the following further fee, as a penalty for such failure, the sum of two dollars and fifty cents: Provided, however That building and loan and savings and loan associations paying special fees provided for in the act under which same are incorporated shall not be required to pay the regular fee provided herein: Provided, further, That the annual fee required to be paid to the Department of Public Works by any public service company shall be deducted from the annual fee provided herein, and the excess only shall be collected under this act.

cess." These statutes prescribed no maximum tax. In other respects they were not unlike the acts here under consideration.

Unless saved by the $3,000 limitation, the Washington enactments are subject to the constitutional objections pointed out in *Looney* v. *Crane Co.*, and must be denied effect.

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68, upheld a tax based upon authorized capital stock but limited to $2,000 imposed by Massachusetts upon foreign corporations for the privilege of doing local and domestic business therein. Consideration was given to the fact that the corporate assets were four times the authorized capital and to the limitation. Weighing all the circumstances, the Court concluded that no direct substantial burden was imposed upon interstate commerce and that property beyond the State was not taxed.

In *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 218, we said:

> "It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the Fourteenth Amendment does not permit taxation of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Min. Co. *v.* Massachusetts, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved."

Baltic Mining Co. v. *Massachusetts* had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the State may be sustained if relatively small. This view did not harmonize with the principles approved by *Looney* v. *Crane Co.*, and was expressly disapproved by *Alpha Portland Cement Co.* v. *Mass.*

It follows that the decree of the court below is erroneous and must be reversed.

Whether, because reckoned upon authorized and not upon actual capital stock, the challenged legislation fails to require like fees for equal privileges within the doctrine of *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, we need not now consider.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 278.—October Term, 1928.

Cudahy Packing Company, Appellant, vs. Jay Grant Hinkle.	On Appeal from the District Court of the United States for the Western District of Washington.

[February 18, 1929.]

Mr. Justice Brandeis, dissenting.

The corporation maintains in Washington a branch office and a warehouse. There, it does a large intrastate business. Nearly one-half of the aggregate sales of $1,313,275.74 made within the State were local and were from broken packages. It is subjected to two taxes which are separate and distinct. The filing fee is payable only once and as laid was $545. The annual license fee is $580. The latter results in a charge of about one-tenth of one per cent on the intrastate business. The corporation's pay roll there is more than a hundred times as large. These small taxes are obviously not more than a fair contribution to the necessary expenses of the State government. They are the same for foreign corporations as for domestic. In my opinion both taxes are valid.

If the statute sought to impose a tax on corporations engaged wholly in interstate commerce, or if the taxes laid a direct burden upon interstate commerce, or if they were laid upon property without the State, or if they were unjustly discriminatory, the fact that they are small in amount would, of course, be immaterial. *Sprout* v. *City of South Bend*, 277 U. S. 163, 171. But these taxes are not subject to any of those infirmities. The taxes are not laid upon interstate commerce. They are not measured by the amount of interstate commerce. They do not grow, or shrink, according to the volume of interstate commerce or of the capital used in it. They are not furtively directed against such commerce. The taxes would be precisely the same in amount if the corporation

did in Washington no interstate business whatsoever. Nor are they taxes laid upon property without the State. Indeed, they are neither property taxes nor substitutes for property taxes. They are an excise, laid solely for the privilege of doing business as a corporation. An individual doing the same business would not be required to pay either these taxes or any substitute therefor.

General Ry. Signal Co. v. *Virginia*, 246 U. S. 500, requires, in my opinion, that the filing fee be held valid. There, a filing fee of $1,000 on an authorized capitalization of $5,000,000 was sustained as against a foreign corporation, under a statute limiting the maximum tax to $5,000. Here, the filing fee demanded was $545 on an authorized capital nearly ten times as great; and the maximum fee demandable in any case was limited to $3,000. The *General Ry. Signal Co.* case was decided by a unanimous Court and the correctness of the decision has never been questioned.

Cheney Bros. Co. v. *Massachusetts*, 246 U. S. 147, 154-158, requires, in my opinion, that the license fee be held valid. That case held a statute imposing an annual license tax valid as applied to all the foreign corporations which, like the Cudahy Company here, did both intrastate and interstate business. That decision was made by a unanimous Court after much deliberation. It has never been disapproved. The statute there in question is identical, so far as here material, with the Washington statute, except that the Massachusetts law fixes a maximum tax of $2,000, while here it is $3,000. But the Massachusetts statute was enacted in 1909; and the tax there challenged was laid in 1913. The Washington statute was enacted in 1925; and the tax here challenged was laid in 1926. The rise in the general price level since 1913 makes the Washington maximum relatively lower than that prescribed by Massachusetts.

The *Cheney Bros. Co.* case is entirely consistent with *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203. In the latter case, the tax held void was on a foreign corporation engaged solely in interstate commerce; and it was laid under a different statute. The situation here is also wholly unlike that considered in *Air-Way Corp* v. *Day*, 266 U. S. 71, 79 and in *Looney* v. *Crane Co.*, 245 U. S. 178, and cases there cited. In those cases, not only did the statutes fail to fix a maximum, but the taxes actually laid were so large as compared with the local business done as to constitute a substan-

tial obstruction of interstate commerce. The case at bar is also unlike *International Paper Co.* v. *Massachusetts,* 246 U. S. 135. There, the statute failed to fix any maximum.

A tax proportionate to the capital of a corporation is sometimes laid in lieu of the ordinary property taxes, and in such cases is treated as a property tax. But the taxes here in question are not of that nature. I am aware that it has been said by this Court that a license fee of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business is essentially a tax on the entire business, interstate as well as intrastate; and a tax upon property outside the State. But that was said in cases where the statute did not fix any maximum. The statement seems to me legally unsound. If it were true, that every tax imposed generally upon a foreign corporation doing both interstate and intrastate business taxed its interstate business and its property outside the State then most of such corporations would largely escape taxation. By the same process of reasoning all taxes laid by a State upon property within its broders, which is used in both intrastate and interstate commerce, would be a tax on interstate commerce. But such taxes have been universally upheld. They are valid, because, when the burden is indirect, even a large burden upon interstate commerce does not render a tax void. See *Southern Ry. Co.* v. *Watts,* 260 U. S. 519, 530; *Hump Hair Pin Co.* v. *Emmerson,* 258 U. S. 290.

It would be unfortunate to hold that merely because a foreign corporation, doing a local business does also interstate business, the State may not lay upon it a reasonable, non-discriminatory excise, necessarily limited to a reasonable amount, to which all domestic corporations similarly situated are subject and which can affect interstate commerce only indirectly, if at all. To hold such a tax void seems to me to ignore the wise rule of decision declared in *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 698: "The substance and not the shadow determines the validity of the exercise of the [taxing] power."

Mr. Justice HOLMES joins in this opinion.